Supreme Court, U.S.
FILED
011375 MAR 15 2002
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

TODD S. AAGAARD
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1207

QUESTION PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations thereunder, authorize an Indian Tribe, with the approval of the Secretary of the Interior (Secretary), to lease tribal lands for mining purposes. The question presented is:

Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	13
A. This case presents a threshold immunity question of fundamental importance	14
B. The court of appeals' decision conflicts with this Court's precedents	16
C. The court of appeals' decision could have serious adverse consequences for the government	27
Conclusion	29
Appendix A	1a
Appendix B	31a
Appendix C	80a
Appendix D	81a
Appendix E	82a
Appendix F	86a

TABLE OF AUTHORITIES

Cases:

Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. *Board of Oil & Gas Conservation*, 792 F.2d 782 (9th Cir. 1986)	18
Blackfeather v. *United States*, 190 U.S. 368 (1903)	27
Brown v. *United States*, 86 F.3d 1554 (Fed. Cir. 1996)	26
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831)	26

Cases—Continued: Page

Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989) 18, 19
Crow Tribe of Indians v. *Montana*, 650 F.2d 1104 (1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982) 17
Duquesne Light Co. v. *Barasch*, 488 U.S. 299 (1989) 25
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 25
Kerr-McGee Corp. v. *Navajo Tribe*, 471 U.S. 195 (1985) 8
Klamath & Moadoc Tribes of Indians v. *United States*, 296 U.S. 244 (1935) 26
Office of Pers. Mgmt. v. *Richmond*, 496 U.S. 414 (1990) 15
Pawnee v. *United States*, 830 F.2d 187 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988) 27
Shoshone Indian Tribe of the Wind River Reservation v. *United States*, 51 Fed. Cl. 60 (2001) 27
United States v. *Hopkins*, 427 U.S. 123 (1976) 25
United States v. *Kagama*, 118 U.S. 375 (1886) 26
United States v. *King*, 395 U.S. 1 (1969) 14
United States v. *Mitchell*:
445 U.S. 535 (1980) 10, 14, 15, 16, 17, 19, 26
463 U.S. 206 (1983) 10, 12, 14, 15, 16, 20, 21, 23, 26
United States v. *Mottaz*, 476 U.S. 834 (1986) 26
United States v. *Sherwood*, 312 U.S. 584 (1941) 14
United States v. *Testan*, 424 U.S. 392 (1976) 15, 16, 25
Vermont Yankee Nuclear Power Corp. v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) 24
White Mountain Apache Tribe v. *United States*, 249 F.3d 1364 (Fed. Cir. 2001), petition for cert. pending, No. 01-1067 ..... 11, 14, 27

Statutes and regulations: Page

Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 ..... 27, 28
General Allotment Act, 25 U.S.C. 348 15
Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*:
25 U.S.C. 396a (§ 1) 2, 17
25 U.S.C. 396a-396g 2
25 U.S.C. 396d 3
25 U.S.C. 396e 3
Tucker Act:
28 U.S.C. 1491(a) 2, 15, 86a
28 U.S.C. 1505 (Indian Tucker Act) 2, 15, 86a
25 U.S.C. 399 ..... 11, 19
30 U.S.C. 207(a) 5
25 C.F.R.:
Pt. 2 (1985) 24
Section 2.3 7
Section 2.3(a) 5
Section 2.11 5
Section 2.12 5
Section 2.19 7
Pt. 2 (2001) 24
Pt. 211:
Section 211.2 (1985) 3, 5
Section 211.15(c) (1985) 3, 21, 22
Section 211.15(c) (1987) 21, 22
Section 211.26 (1985) 3
Section 211.43(a)(2) (2001) 3, 22
Section 211.43(b) (2001) 3, 22
43 C.F.R. 4.5(a)(2) (1985) 7, 24

Miscellaneous:

56 Fed. Reg. (1991):
p. 58,734 22
p. 58,736 22
H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938) 19
S. Rep. No. 985, 75th Cong., 1st Sess. (1938) 18, 19

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 263 F.3d 1325. The opinion of the Court of Federal Claims (App., *infra*, 31a-79a) is reported at 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 80a) was entered on August 24, 2001. A timely petition for rehearing was denied on November 16, 2001 (App., *infra*, 80a-81a). On February 4, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to

and including March 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a, states:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), and Indian Tucker Act, 28 U.S.C. 1505—are set forth in the appendix. App., *infra*, 86a.

STATEMENT

This case concerns the potential liability of the United States in money damages for breach of trust when the Secretary of the Interior has approved a mineral lease agreed to by an Indian Tribe and a private lessee.

1. The United States, through the Secretary of the Interior (Secretary), regulates the leasing of mineral resources on Indian tribal lands under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a-396g, and regulations thereunder. The IMLA authorizes an Indian Tribe, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes for a term not to exceed 10 years and as long thereafter as minerals are produced in paying quantity. 25 U.S.C. 396a. The IMLA also delegates to the Secretary the authority to promulgate rules and

regulations governing mineral "operations," 25 U.S.C. 396d, and permits the Secretary to authorize other officials in the Indian Service to approve Indian mineral leases, 25 U.S.C. 396e.

The Secretary has promulgated regulations implementing the IMLA. The regulations in effect during the events at issue in this case provided that "Indian tribes * * * may, with the approval of the Secretary * * * or his authorized representative, lease their land for mining purposes." 25 C.F.R. 211.2 (1985). The regulations established minimum royalty rates for minerals subject to leasing, including, for coal, "a royalty of not less than 10 cents per ton of 2,000 pounds of [coal]." 25 C.F.R. 211.15(c) (1985).[1] The regulations also provided that lessees could not assign or transfer a lease without the Secretary's approval, 25 C.F.R. 211.26 (1985), and established various other requirements concerning mineral leases and parties to such leases.

2. The Navajo Nation (Tribe), a federally recognized Indian Tribe, occupies the largest Indian reservation in the United States. The Tribe's Reservation comprises more than 25,000 square miles, and spans parts of northeast Arizona, northwest New Mexico, and southeast Utah. Over the past century, large deposits of minerals—including coal, oil, and gas—have been discovered on the Tribe's reservation lands, which are held for the Tribe in trust by the United States. Each year, the Tribe receives tens of millions of dollars in royalty payments pursuant to Indian mineral leases that it has entered into with private companies in accordance with the IMLA. See C.A. App. A2255-A2262.

---

[1] In 1996, the minimum royalty rate on new leases for coal was increased to "12 1/2 percent of the value of production produced and sold from the lease." 25 C.F.R. 211.43(a)(2) (2001). The regulations further state, however, that "[a] lower rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b).

a. Peabody Coal Company (Peabody) mines coal on the Tribe's lands pursuant to leases covered by the IMLA. Lease 8580 was executed by the Tribe and the Sentry Royalty Company (Peabody's predecessor in interest), and was approved by the Secretary in 1964. The lease established a royalty rate of 37.5 cents per ton of coal, but provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary * * * or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. App., *infra*, at 82a. In 1966, Peabody (through Sentry Royalty Company) entered into two other coal leases, Lease 9910 and Lease 5743. Those leases contained somewhat higher royalty rates than Lease 8580, see C.A. App. A2678, but did not contain a provision subjecting those rates to reasonable adjustment by the Secretary.[2]

b. In the 1970s, the Tribe sought to renegotiate its existing mineral leases with its private lessees, including Peabody, to increase the royalty payments generated by those leases. As the 20-year anniversary of Lease 8580 approached, the royalty rate established by that lease of 37.5 cents per ton was "equivalent to about 2% of gross proceeds" on the lease. App., *infra*, 2a. That royalty rate was considerably above the minimum royalty rate (10 cents per ton) established by the IMLA regulations for coal leases subject to approval by the Secretary, 25 C.F.R. 211.15(c) (1985), but at the same time was below the minimum rate (12 1/2 percent of gross proceeds) set by Congress in 1976 for coal mined on

[2] Leases 9910 and 5743 cover coal resources located within a former joint use area shared by the Navajo Nation and the Hopi Tribe. The Navajo and Hopi split the revenues from those leases. See C.A. App. A1988, A2678. Leases 9910 and 5743 paid combined royalties of 6.67 percent for coal sold off the leases and 5.33 percent for coal sold on the leases. *Id.* at A2678.

federal lands not subject to the IMLA. See 30 U.S.C. 207(a); App., *infra*, 38a.

In March 1984, the Chairman of the Navajo Tribal Council wrote to the Secretary and asked him to adjust the royalty rate under Lease 8580, in accordance with the term of that lease allowing a "reasonable adjustment" by the Secretary after 20 years. C.A. App. A375-A376. The Chairman asserted that an increase substantially in excess of 12 1/2 percent was warranted in light of the quality of the coal, but that "simple equity" indicated that the minimum royalty rate should not be less than the 12 1/2 percent provided for under federal coal leases. *Id.* at A375. The Chairman also sought the Secretary's "assistance and support in securing voluntary adjustment" in the royalty rates with respect to leases that did not contain an adjustment clause like Lease 8580's and that, in the Chairman's view, contained rates that were "unfair and inequitable." *Id.* at A375-A376.

In June 1984, the Area Director of the Bureau of Indian Affairs for the Navajo Area Office, acting pursuant to the Tribe's request, adjusted the royalty from 37.5 cents per ton to 20 percent of gross proceeds. He then notified Peabody of the adjustment. App., *infra*, 2a-3a; C.A. App. A438.

c. Peabody appealed the Area Director's decision pursuant to 25 C.F.R. 211.2 (1985), challenging, *inter alia*, the Area Director's failure to consult Peabody before reaching his decision. See C.A. App. A2288-A2315.[3] The appeal was

[3] The Department of the Interior's regulations allowed "any interested party adversely affected by a decision * * * of an Area Director of the Bureau of Indian Affairs not approved by the Secretary before the decision was made" to file an administrative appeal. 25 C.F.R. 2.3(a) (1985). The appellant was required to serve the notice of appeal on any other known interested parties, 25 C.F.R. 2.11 (1985), who had the right to file a response, 25 C.F.R. 2.12 (1985). In this case, Peabody (and the utility companies that used coal produced under the lease) appealed the Area Director's royalty adjustment decision to the Commissioner of Indian

taken under consideration by Acting Assistant Secretary of the Interior for Indian Affairs, John Fritz. Shortly thereafter, the Tribe broke off negotiations with Peabody on the proposed amendments. App., *infra*, 39a-40a.

While its appeal was pending, Peabody wrote to Department of the Interior (DOI) officials, asking them to postpone a decision on its appeal in order to permit the parties to attempt to reach a negotiated settlement with respect to a full range of issues, including the royalty rate adjustment to Lease 8580. C.A. App. A2686. In July 1985, following a meeting with the Tribe, Peabody wrote to Secretary of the Interior Donald Hodel, stating that the Tribe apparently had received word of an imminent decision in the Tribe's favor on the appeal of the Area Director's decision, and had informed Peabody that it was breaking off negotiations until DOI had ruled on the appeal. Peabody asked the Secretary to assume jurisdiction of its appeal and either to postpone a decision to allow for a negotiated settlement or to rule in Peabody's favor. *Id.* at A2688. A copy of that letter was sent to the Tribe. In response, the Tribe wrote to the Secretary, urging him to reject Peabody's request and to decide the appeal in its favor. *Ibid.*; App., *infra*, 40a.

Peabody then retained Stanley Hulett, a former aide and friend of Secretary Hodel, and sought a meeting with the Secretary. The record indicates that Hulett and Peabody representatives met with Secretary Hodel in July 1985. App., *infra*, 40a. On July 17, 1985, Secretary Hodel sent a memorandum to Acting Assistant Secretary Fritz, a draft of which had been provided to the Secretary by Peabody, "suggest[ing]" that he inform the parties "that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fash-

---

Affairs. The Tribe filed an answer brief in opposition to those appeals. C.A. App. A477-A483.

ion." *Id.* at 76a. The Secretary's memorandum explained that "[a]ny royalty adjustment which is imposed on the parties without their concurrence will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. *Ibid.* The Secretary assured the Assistant Secretary, however, "that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." *Id.* at 77a.[4]

d. The Tribe "has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results," and at most "admit[s] that 'someone from Washington' had urged a return to the bargaining table." App., *infra*, 43a; see C.A. App. A2370, A2689, A2690-A2691. In late August 1985, the Tribe and Peabody renewed their negotiations. On September 23, 1985, they reached a tentative agreement over a package of amendments not only to Lease 8580, but also to Leases 9910 and 5743. App., *infra*, 42a. The negotiated agreement resolved a broad range of issues concerning the existing lease agreements between the parties.

In particular, "[i]n consideration of the benefits associated with [these lease] amendments," the parties agreed to jointly move to vacate the Area Director's July 1985 decision and, instead, adjust the royalty rate under Lease 8580 from 37.5 cents per ton to 12 1/2 percent of the monthly gross proceeds.

---

[4] The court of appeals appears to have believed that Acting Assistant Secretary Fritz had decided Peabody's appeal in favor of the Tribe, but then withdrew that decision in response to the Secretary's July 1985 memorandum. App., *infra*, 3a. Although a draft decision in favor of the Tribe had been prepared, a final decision (which would have required the signature of the Commissioner of Indian Affairs, 25 C.F.R. 2.3, 2.19 (1985)) had not been issued. See *id.* at 40a; C.A. App. A2686-A2687. In any event, the DOI regulations authorized the Secretary "to direct any [Department employee] to reconsider a decision." 43 C.F.R. 4.5(a)(2) (1985).

App., *infra*, 84a-85a. Peabody further agreed to pay royalties at the new 12 1/2 percent rate on all coal mined under the lease since February 1, 1984. *Ibid.* As part of the deal, Peabody also agreed to increase the royalty rates with respect to Leases 9910 and 5743, even though those leases, unlike Lease 8580, did not contain any provision for the adjustment of the royalty rate during the term of the lease. C.A. App. A2678, A2692.

At the same time, Lease 8580 was amended to acknowledge the validity of tribal taxation of coal production, and to recognize the Tribe's agreement to waive certain back tribal taxes. C.A. App. A805-A810. The tax rate was to be capped at 8 percent, which "would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined." App., *infra*, 44a.[5] Peabody further agreed to pay the Tribe $1.5 million when the amendments became effective, and $7.5 million when it began mining additional coal agreed to by the parties. C.A. App. A804-A805; see App., *infra*, 43a (The agreement not only adjusted existing royalty rates on the leases, but "also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments.").

e. In August 1987, the Navajo Tribal Council approved the lease amendments. A final agreement was signed by the parties in November 1987. The parties then asked Secretary Hodel to approve their agreement. The Secretary formally approved the lease amendments on December 14, 1987. Shortly thereafter, the Area Director's June 1984 decision

[5] This Court had just upheld the right of the Navajo Nation to impose taxes on lessees under tribal leases. *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985).

adjusting the royalty rate to 20 percent was vacated. App., *infra*, 45a.

3. In 1993, the Tribe brought suit against the United States in the Court of Federal Claims, alleging that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody and adjusting the royalty rate on Lease 8580 to 12 1/2 percent of gross proceeds constituted a breach of trust and a breach of contract. The Tribe did not seek to invalidate the lease amendments, but instead sought $600 million in damages. On cross-motions for summary judgment, the Court of Federal Claims rejected both the Tribe's breach of trust and breach of contract claims, and granted judgment for the United States. App., *infra*, 31a-79a.

With respect to the claim for breach of trust, the Court of Federal Claims found that the United States had entered into a general fiduciary relationship with the Navajo Nation by virtue of the nature of its relationship with Indian Tribes, and the fact that the United States holds tribal lands in trust. App., *infra*, 48a. Although the court noted that the relationship between Indians and the United States "is not necessarily described by the common law of trusts," the court nevertheless decided to consider at the outset the government's actions against the duties governing a common law trustee. *Ibid.* Applying common law standards, the court concluded that the Secretary had contravened the common law fiduciary duties of care, loyalty, and candor by meeting with Peabody while the company's administrative appeal was pending and not disclosing that meeting to the Tribe. *Id.* at 48a, 52a. The court further observed that, "[w]ere this a court of equitable jurisdiction considering a *private* trust, [the Tribe] might easily qualify for [damages]." *Id.* at 52a (emphasis added).

The court continued, however, that "to succeed in litigation in this Court, [the Tribe] must show that the IMLA

imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages." App., *infra*, 53a. In determining whether the Tribe had made such a showing, the court reviewed the IMLA and its implementing regulations in the light of this Court's decisions in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). See App., *infra*, 54a, 59a-61a.

The court recognized "that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity." App., *infra*, 55a. But after reviewing the IMLA and implementing regulations, the court concluded that the United States' "responsibility as it relates to coal royalties does not rise above a generalized trust obligation," which under the *Mitchell* decisions, it explained, is not sufficient to create a money-mandating duty on the government's part. *Id.* at 66a; see also *id.* at 67a ("[N]either the IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal."). The court further concluded that, although the Tribe's complaint "[a]lleg[ed] breaches of general fiduciary duties, [it] failed to link any breach to a specific money-mandating statutory or regulatory provision." *Id.* at 66a.

The court emphasized that "[the Tribe] cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process." App., *infra*, 67a. Indeed, the court noted that in this case "the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease*" between the Tribe and Peabody —*i.e.*, the provision of Lease 8580 allowing the Secretary to adjust the royalty rate after 20 years, *ibid.*—rather than from a statute or regulation. "Even then," the court continued, "the Secretary's only guidance was to be 'reasonable' in revising rates." *Id.* at 67a-68a. The court acknowledged that, although it is not required to do so by statute or regulation, "as a matter of policy, DOI would not approve coal leases with royalties less than those the [United States] would receive for its own coal— * * * 12.5 percent." *Id.* at 68a. But the court noted that "there is no claim by the [Tribe] that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy." *Ibid.*[6]

4. a. A divided panel of the Federal Circuit reversed on the breach of trust claim. App., *infra*, 1a-30a. The court began by discussing this Court's *Mitchell* decisions, see *id.* at 5a-6a, and then its own precedents involving breach of trust claims by Indians, including its recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), petition for cert. pending, No. 01-1067 (filed Jan. 22, 2002). In *White Mountain Apache*, the court noted, "[a]lthough the statute was silent on how the United States was to administer the property," the court had applied the common law of trusts to find a duty on the part of the United States enforceable in a suit for damages, "despite the absence of a specific statute and regulations." App., *infra*, 6a.

The court of appeals then analogized the degree of federal involvement with respect to mineral leasing on Indian lands under the IMLA and its implementing regulations to the degree of federal involvement with respect to forest management on Indian lands, which this Court held in *Mitchell II* gave rise to a fiduciary duty that, if breached, would support a claim for money damages. App., *infra*, 8a; see *id.* at 8a-10a. Pointing to 25 U.S.C. 399 (which, as explained below, is not

---

[6] The Court of Federal Claims also rejected the Tribe's breach of contract claim, finding that the Secretary was not a party to the lease, and that the Secretary's authority under the lease to adjust the royalty rate was not a binding contractual obligation to do so. App., *infra*, 69a-75a.

part of the IMLA), the court also concluded that "the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes." App., *infra*, 8a-9a; *id.* at 11a. With that understanding, the court concluded that the Court of Federal Claims had erred in finding that there was no sufficient trust relationship between the United States and the Tribe with respect to coal resources that could give rise to a suit for damages in this case. *Id.* at 11a.

After finding the existence of such a trust relationship, the court of appeals held that the Secretary's actions with respect to Peabody's administrative appeal concerning the adjustment of the royalty rate under Lease 8580—which the court characterized as "suppressing and concealing" the decision of the Assistant Secretary and "thereby favoring Peabody interests to the detriment of Navajo interests," App., *infra*, 11a—violated both the common law duties on which the Court of Federal Claims had relied, as well as what the court of appeals described as a statutory duty "to obtain for the Indians the maximum return for their minerals." *Id.* at 12a. The court did not, however, identify what specific provision of the IMLA or its implementing regulations had imposed such a duty, or had been violated by the Secretary. Then, citing *Mitchell II*, the court concluded that the Tribe was entitled to money damages for breach of the fiduciary duties the court had described. *Ibid.*; see *ibid.* ("Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of 'damages resulting from a breach of the trust.'") (quoting *Mitchell II*, 463 U.S. at 226). The court remanded for a "determination of damages." *Ibid.*

b. Judge Schall concurred in part and dissented in part. App., *infra*., 13a-30a. Drawing on this Court's *Mitchell* decisions and circuit precedent, he reasoned that it is not enough to show a violation of a general fiduciary relationship stemming from federal involvement in a particular area.

Rather, "to state a claim upon which relief can be granted," Judge Schall reasoned, a Tribe "must show the breach of a specific fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue." *Id.* at 29a-30a; see *id.* at 16a ("[U]nder *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship.").

Judge Schall agreed that the IMLA and implementing regulations create a "general fiduciary relationship" between the United States and the Tribe with respect to mineral leases on Indian lands, but at "this point [he] part[ed] company with the majority." App., *infra*, 25a. In his view, "the only government action in this case that implicated a specific fiduciary responsibility to the [Tribe] was DOI's approval of the Agreement" in 1987. *Id.* at 26a. He explained that, although other government actions "may demonstrate disloyalty to the [Tribe] in a vacuum," the Tribe was required to show that the government breached a specific fiduciary obligation with respect to the agreed package of lease amendments. *Id.* at 28a. Judge Schall concluded that the Secretary had breached such a duty by failing to conduct an economic analysis of the lease agreement, which he found, citing common law principles, was implicit in the Secretary's authority to approve the lease amendments. *Id.* at 27a, 30a.

REASONS FOR GRANTING THE PETITION

The divided court of appeals' decision in this case holds that the United States is liable for up to $600 million in damages for breach of trust by the Secretary's actions in 1985 in requesting the Acting Assistant Secretary to defer a decision on Peabody's administrative appeal concerning a royalty rate adjustment under Lease 8580, without finding that the United States violated any specific fiduciary duty established by the IMLA or regulations thereunder. And the court did so without finding that the Secretary violated

any statutory or regulatory duty in 1987 by approving the package of negotiated lease amendments, which superseded the royalty-adjustment provision in Lease 8580.

The decision of the court of appeals directly contravenes this Court's precedents establishing the predicate necessary to show that the United States may be liable in damages for breach of a trust responsibility owed to an Indian Tribe. *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). The decision in this case, particularly coupled with the court of appeals' recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), in which the United States also has filed a petition for a writ of certiorari (No. 01-1067), demonstrate the need for review by this Court with respect to the proper application of its *Mitchell* decisions, and with respect to the important sovereign immunity principles on which the *Mitchell* decisions rest.

A. This Case Presents A Threshold Immunity Question Of Fundamental Importance

The United States enjoys sovereign immunity from suit for damages except when it has undertaken, by statute or implementing regulation, to subject itself and the public's Treasury to claims for violations of specific duties that such provisions of law have imposed. The central question in this case is whether the United States has waived its sovereign immunity with respect to the breach of fiduciary duty claim that the court of appeals sustained below.

1. "[T]he Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and * * * such a waiver cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969) (citing *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Congress has consented to be sued on certain claims for money

damages under the Tucker Act and the Indian Tucker Act. 28 U.S.C. 1491(a), 1505. Those statutes, however, are merely jurisdictional. See *Mitchell II*, 463 U.S. at 212-217. They do "not create any substantive right enforceable against the United States for money damages." *Id.* at 216; see *United States* v. *Testan*, 424 U.S. 392, 398 (1976). As a result, in order to state a claim for money damages against the United States that is cognizable under the Tucker Acts, a plaintiff must point to a "substantive right" stemming from some other provision of law—such as an Act of Congress or implementing regulation—that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. The requisite waiver of sovereign immunity exists only "[i]f a claim falls within this category." *Id.* at 218; see *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 431 (1990).

2. This Court's *Mitchell* decisions rest on that foundation. In the underlying *Mitchell* litigation, the Quinault Tribe and numerous individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—which provides for the United States to hold allotted lands "in trust for the sole use and benefit of [Indian allotees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not support a money-damages action against the United States for alleged mismanagement of timber resources on allotted lands. As the Court explained, the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]." *Id.* at 542. "The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.*

In *Mitchell II*, the Court considered a different set of statutes and implementing regulations, under which the government itself managed virtually every aspect of Indian timber operations, and held that those provisions could "fairly be interpreted as mandating compensation by the Federal Government" for mismanagement of such resources. 463 U.S. at 228. In so holding, the Court emphasized that those provisions established "comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* at 222. Distinguishing the situation in *Mitchell I*, the Court stated: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id.* at 224.[7]

Together, the *Mitchell* decisions establish important limitations on the liability of the United States in damages for breach of a fiduciary duty owed to an Indian Tribe or Indians.

B. The Court Of Appeals' Decision Conflicts With This Court's Precedents

In finding that the United States is liable in damages in this case for breach of trust, the court of appeals contravened the central teachings of this Court's *Mitchell* decisions.

[7] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the type of comprehensive statutory and regulatory scheme involved in that case—requiring the government to manage trust property for the benefit of the Indians—failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400).

1. In *Mitchell I*, the Court held that the fact that a statute creates a trust relationship between the United States and an Indian Tribe with respect to property is *not* in itself sufficient to give rise to a money-mandating obligation on the part of the United States. 445 U.S. at 542. The Court reached that conclusion even though the statute in *Mitchell I*, the General Allotment Act, explicitly requires the United States to hold land "in trust for *the sole use and benefit of the Indian* to whom such allotment shall have been made." *Id.* at 541 (emphasis added). The Court explained that "[t]he Act does not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of allotted lands." *Id.* at 542 (emphasis added); see *id.* at 543.

In the IMLA, the United States has assumed certain fiduciary responsibilities with respect to the leasing of minerals on Indian lands, but that Act "does not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of [leased] lands." *Mitchell I*, 445 U.S. at 542 (emphasis added). To the contrary, the key provision of that Act transferred leasing authority from the Secretary *to the Tribes*. It provides that tribal lands "may, with the approval of the Secretary * * *, be leased for mining purposes, *by authority of the tribal council or other authorized spokesmen*." 25 U.S.C. 396a (emphasis added). Moreover, as the Court of Federal Claims explained, that provision squares with an important purpose of the IMLA—"to foster Indian self-determination," an "ideal" that is "directly at odds" with the notion that the Secretary has full "*control* over leasing." App., *infra*, 58a-59a; see *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1112 (1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982) (The IMLA gave "tribal governments

control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary").[8]

To be sure, another purpose of the IMLA is to see that Indian Tribes receive "a profitable source of revenue" from the leasing of mineral resources on their lands. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989). That conclusion is supported by the legislative history of the IMLA, which states in part: "It is not believed that the present law is adequate to give the Indians the greatest return from their property." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1938). But as this Court admonished in *Cotton Petroleum*, 490 U.S. at 179, that statement cannot be given "talismanic effect." Even when "[r]ead in the broadest terms possible," the reference in the committee report to "greatest return from their property" "suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Ibid.*

The reference in the legislative history thus does not entitle a Tribe to renegotiate a lease—or to sue the United States—any time that it believes in retrospect that it did not receive the greatest possible return for its resources. Nor does it obligate the Secretary to second guess or disapprove leases that already have been negotiated and agreed to by a

---

[8] See also *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation* v. *Board of Oil & Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (noting that one of the purposes of the IMLA was "to increase Indian authority in granting leases"). That purpose is promoted by the IMLA. As this Court recognized in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 177, 179 (1989), the legislative history of the IMLA makes clear that the statute was intended to make it easier for Tribes to engage in—and profit from—mineral leasing by eliminating obstacles placed on such leasing that did not apply to non-Indians.

Tribe and a lessee on the ground that, in the Secretary's view, the royalty rate and other conditions agreed to by the parties would not maximize the Tribe's profits, or that an alternative set of lease terms would be more in the best interests of the Tribe. The IMLA authorizes the Tribes to negotiate mineral leases with others. The Act's requirement of approval by the Secretary furnishes a general backstop protection, not a duty on the part of the Secretary independently to determine and impose on the parties the terms that she believes will maximize the return for one side of the negotiated transaction.

Moreover, as discussed above, in *Mitchell I*, the statute explicitly obligated the United States to act for the "*sole* * * * benefit" of the Indians, but the Court nonetheless concluded that it did not give rise to a money-mandating obligation on the part of the United States. 445 U.S. at 541 (emphasis added). In the same vein, to the extent that the IMLA generally obligates the Secretary to act for the benefit of Indian Tribes, or in the interests of Tribes, the existence of such a general fiduciary duty does not in itself authorize a damages action against the United States with respect to every claim that the Secretary erred in some particular way in implementing the IMLA.[9]

---

[9] The court of appeals relied on "the interests of the Indians" language in 25 U.S.C. 399 as evidence that the IMLA creates a fiduciary responsibility to manage the mineral resources for the benefit of the Indians. App., *infra*, 11a. But Section 399 is not a part of the IMLA. Section 399 was enacted almost 20 years before the IMLA, and authorized the Secretary to lease certain unallotted Indian lands for mining purposes under terms set by the Secretary, *without* approval by the Tribes. The legislative history to the IMLA specifically notes that the Act was intended to correct Section 399's deficiencies, including with respect to the *lack* of control by Indian Tribes over the leasing of their mineral resources. S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, *supra*, at 2. In any event, even if Section 399 were a part of the IMLA, its reference to the interests of the Indians would not compel the conclusion here, any more than in *Mitchell I*, that

2. Trying to take this case out of the realm of *Mitchell I*, the court of appeals reasoned that here, as in *Mitchell II*, the statutory and regulatory scheme gives the Secretary "control" over the management of the Indian resources at issue, and that the existence of such control gave rise to a money-mandating duty on the part of the United States in managing those resources, including with respect to "*all* appurtenant trustee duties, obligations, and liabilities." App., *infra*, 5a (emphasis added); see *id.* at 8a ("The [IMLA] and its regulations are similar to those governing timber resources that were subject of *Mitchell II*, insofar as federal authority is concerned."). That understanding of *Mitchell II* is flawed on several different levels.

a. First, the degree of control exercised by the Secretary with respect to timber management on Indian lands is much greater than the degree of any control exercised by the Secretary with respect to Indian mineral leases. In *Mitchell II*, this Court went to great lengths to describe the "pervasive" control that the United States has expressly assumed with respect to Indian timber sales. 463 U.S. at 219; see *id.* at 220 ("regulations address[] virtually every aspect of forest management"); *id.* at 222 (statutes establish "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber"); *id.* at 225 (government has "assume[d] * * * elaborate control over forests and property belonging to Indians."); *id.* at 225 n.29 (discussing "pervasive federal control" in this area). As the Court of Federal Claims explained, "the level of management and control that the government has assumed over coal leases under IMLA" does not come close to the level of federal control on which this Court grounded *Mitchell II*. See App., *infra*, 54a; see *id.* at 55a-59a.

---

the United States has breached a money-mandating duty owed to the plaintiff Tribe.

b. Second, in *Mitchell II* this Court did not focus on the existence of federal control with respect to Indian resources *vel non*. Instead, in addition to pointing to the existence of a "pervasive" regulatory scheme, the Court emphasized that the government had specifically assumed "fiduciary *management* duties" with respect to Indian resources. 463 U.S. at 218 (emphasis added); see *id.* at 222 ("emphasizing the Secretary of the Interior's management duties"). For example, the statute in *Mitchell II* expressly provided that "[s]ales of timber 'shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs." *Id.* at 209 (citations omitted); see *id.* at 222. In addition, Congress mandated that, "[i]n performing this duty, the Secretary was specifically required to take into account" several different factors, including "the highest and best use of the land" and the "'present and future financial needs of the owner and his heirs." *Ibid.*; see also *id.* at 220-221 (Congress has imposed "*strict*[] duties upon the Government with respect to Indian timber management," including by "expressly direct[ing] that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'") (emphasis added).

Congress has not imposed any comparable "fiduciary management duties" on the Secretary with respect to Indian mineral leases. When the Secretary approves a lease (or an amendment to an existing lease), the IMLA neither mandates that she establish a particular royalty rate or other terms, nor imposes specific standards that the Secretary must assure are satisfied. The regulations that applied when Peabody filed its appeal in 1985 and the Secretary approved the lease amendments in 1987, for example, provided only that the Secretary could not approve a lease with a minimum royalty rate of *less* than "10 cents per ton." 25 C.F.R. 211.15(c) (1985 and 1987). As noted above, the current regulations have increased the minimum royalty rate to 12

1/2 percent of gross proceeds—the rate that applies to coal leases on federal lands—and state that "[a] lower royalty rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b) (2001). The regulations do not separately refer to the Secretary's approval of a rate that is at least equal to the minimum 12 1/2 percent rate, much less require the Secretary to insist that the parties agree to a higher rate under particular circumstances. That structure of even the current regulations underscores that the United States has not assumed any specific fiduciary management duties with respect to the approval of a lease that contains a royalty rate at least equal to the minimum rate. See 56 Fed. Reg. 58,734, 58,736 (1991) (minimum royalty rate regulation provides "reasonable royalty rates for lessors.").[10]

If Congress or the Secretary, acting pursuant to statute, determines that it is appropriate to adopt additional, or more innovative, management duties with respect to coal leases, the statutes and regulations discussed in *Mitchell II* with respect to timber management underscore that they are capable of doing so.

c. Third, *Mitchell II* establishes that, even when the United States has entered into a money-mandating trust relationship with an Indian Tribe, to recover damages for

---

[10] In this case, there is no question that the leases at issue complied with the IMLA's minimum royalty rate. In 1987, the minimum royalty rate for coal leases under the IMLA was 10 cents per ton. 25 C.F.R. 211.15(c) (1987). The original royalty rate on Lease 8580 was 37.5 cents per ton—considerably *higher* than that standard. Following their amendment in 1987, the three leases—each of which has a total royalty rate of 12 1/2 percent—were well above the minimum rate, and also satisfy the new standard that was subsequently promulgated by the Secretary in 1996. 25 C.F.R. 211.43(a)(2) (2001) (minimum royalty rate for open-pit or strip coal leases is 12 1/2 percent of the value of coal produced and sold from the lease).

breach of trust an Indian plaintiff must establish a violation of one of the specific statutes or regulations giving rise to that relationship. See 463 U.S. at 224 (The statutes and regulations governing Indian timber management "establish a fiduciary relationship *and define the contours of the United States' fiduciary responsibilities.*") (emphasis added); *id.* at 219 (To determine whether an Indian Tribe has a damages claim, the Court examines whether the statutes and regulations at issue "can be fairly interpreted as mandating compensation for damages sustained *as a result of a breach of the duties they impose.*") (emphasis added). That causal link was present in *Mitchell II*, where the Indian plaintiffs claimed that the government had breached specific fiduciary duties that it owed to them under the statutes and regulations discussed above in managing the timber resources at issue. See *id.* at 210.

The requisite causal link, however, is missing here. Even assuming (contrary to the considerations discussed above) that the IMLA and its implementing regulations establish the kind of trust relationship that the Court found in *Mitchell II*, the court of appeals did not find, and indeed the Tribe has not even alleged, the breach of any specific duties imposed by the statutes or regulations giving rise to that relationship. See App., *infra*, 66a (In "[a]lleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision."). The Tribe's money damages claim for breach of trust fails for that reason alone.

In finding that the United States had breached money-mandating duties owed to the Tribe, the court of appeals did not object to the Secretary's approval of the lease amendments, or to the fairness of the lease package that the Tribe negotiated and asked the Secretary to approve in 1987. Instead, the court pointed to the "[t]he action of the Secretary in suppressing and concealing the decision of the

Assistant Secretary" on Peabody's administrative appeal concerning a provision in Lease 8580 that was superseded by those amendments. App., *infra*, 11a; see *id.* at 11a-12a. Nothing in the IMLA itself or in the regulations implementing the IMLA imposes any specific duties on the Secretary with respect to his supervision of his subordinates on such appeals. Rather, DOI regulations of general applicability establish a process for appeals from administrative actions by various DOI officials, see 25 C.F.R. Pt. 2 (1985 and 2001), and the procedural standards governing that process are defined by the Administrative Procedure Act (APA) and the DOI regulations, not by the IMLA. The court of appeals did not find that the Secretary's actions violated any provision of the DOI's procedural rules or the APA and, in fact, the DOI rules in place at the time the Secretary acted explicitly reserved to the Secretary all powers conferred upon him by law and authorized him "to direct any [Department employee] to reconsider a decision." 43 C.F.R. 4.5(a)(2) (1985); see note 4, *supra*.[11]

Even if there were a procedural rule or principle that the Secretary violated with respect to Peabody's administrative appeal, that would not justify an action for money damages under the Tucker Act. Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim

[11] The court of appeals was not free to override or supplement the procedural rules adopted by the Secretary with its own view of the proper relationship between the Secretary and a subordinate official concerning an internal agency appeal. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Indeed, the court of appeals seriously misapprehended the constitutional structure of our government in characterizing the decision by a Head of an Executive Department not to allow a draft of a decision of a subordinate officer to go into effect as the improper "suppressing and concealing" (App., *infra*, 11a) of the subordinate's action.

under the Tucker Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Instead, the proper recourse would be an APA action to set aside the Secretary's 1987 decision approving the lease amendments, or to timely seek to challenge or reinstate the administrative proceedings concerning the Area Director's decision to increase the royalty rate under the adjustment clause in Lease 8580, not a claim for money damages against the United States for breach of any trust relationship established pursuant to the IMLA.[12]

3. The court of appeals also erred to the extent that it treated the United States as if it were a private trustee that may be liable in money damages to an Indian Tribe for any breach of the common law duties cited by the court. See App., *infra*, 11a-12a, 12a-13a. As the Court of Federal Claims explained, the violations of the common law duties

[12] To the extent that the court of appeals believed that the Secretary's actions with respect to Peabody's administrative appeal rendered his subsequent approval of the lease amendments a breach of the United States' fiduciary obligations, the court was mistaken. As the Court of Federal Claims noted (App., *infra*, 67a), the Secretary's authority to adjust the royalty rate at issue in this case was "*derive[d] solely from the terms of the lease*" that the Tribe had executed in 1964, not from the IMLA. Moreover, even assuming (contrary to the considerations discussed above) that the IMLA imposed a fiduciary obligation on the Secretary not to approve lease amendments unless they were in the best interest of the Indian mineral owner, the Tribe at a minimum would be required to establish that the Secretary could not reasonably have believed that the overall outcome of the approval decision—the lease amendments themselves—was in the Indian mineral owner's best interest. The Tribe has made no such claim. *Cf. Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 312-313 (1989); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry * * * is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.").

that it found "do not themselves confer jurisdiction on this Court, nor entitle [the Tribe] to money damages." *Id.* at 52a.

The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however, give rise to legally enforceable duties on the part of the United States, much less duties that are enforceable in a suit for money damages. In determining when an alleged breach of those duties may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986); *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). To the extent that the court of appeals' decision puts the United States in the shoes of a private, common law trustee for purposes of determining whether the government has assumed money-mandating obligations to an Indian Tribe, the decision departs significantly from this Court's precedents.[13]

---

[13] To the extent that the Federal Circuit based its decision on finding a breach of common law trust duties, rather than specific statutory or regulatory duties assumed by the United States, its decision also parts with prior circuit precedent applying the *Mitchell* principles. For example, in *Brown* v. *United States*, 86 F.3d 1554 (Fed. Cir. 1996), the court distinguished between the existence of a fiduciary relationship and whether a cognizable claim for relief had been stated, and held that, "where no specific statutory requirement or regulation is alleged to have been breached by the Secretary, the money claim against the government must fail." *Id.* at 1563; see also *Pawnee* v. *United States*, 830 F.2d 187, 191-192 (Fed. Cir. 1987), cert. deneid, 486 U.S. 1032 (1988).

C. The Court Of Appeals' Decision Could Have Serious Adverse Consequences For The Government

The practical implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals $600 million. The decision below will encourage the filing of damages claims against the United States for breach of trust with respect to the Secretary's approval of Indian mineral leases with private entities. Indeed, any Indian Tribe that believes, with the benefit of hindsight or due to market corrections, that it could have negotiated a better mineral lease deal may seek to obtain damages from the Secretary for breach of trust in approving such an agreement under the IMLA or, as in this case, even under a separate lease term. At a minimum, such a development will subject the United States to costly litigation over such matters as the market value of lease terms negotiated several—or, as here, many—years ago. The Court of Federal Claims already has applied the decision in this case in holding that the United States may be liable in money damages for alleged mismanagement of resources. See *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 51 Fed. Cl. 60, 68 (2001).

In addition, the important and recurring nature of the basic question presented by this case is underscored by the Federal Circuit's recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), petition for cert. pending, No. 01-1067. There, the Federal Circuit held that the United States is accountable in money damages for an alleged breach of trust in connection with the property placed in trust by the Act of March 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8, even though the Tribe did not

allege that the United States had breached a specific statutory or regulatory duty to manage the property for the benefit of the Tribe and, indeed, the 1960 Act explicitly reserved *to the government* the right to use the property for its *own* purposes "for as long as" (74 Stat. 8) it deems necessary. In this case, the Federal Circuit specifically relied upon the fundamentally flawed reasoning of *White Mountain Apache* in finding the breach of a money-mandating obligation, without identifying the violation of any specific statutory or regulatory duty. See App., *infra*, 6a ("Although the statute [in *White Mountain Apache*] was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations.").

Under the Tucker Acts, the Federal Circuit is the only circuit that has jurisdiction to consider claims against the United States for money damages for violation of a statute or implementing regulation. It is therefore critical for this Court to review the Federal Circuit's recent, and marked, departure from the teaching of the *Mitchell* decisions with respect to the necessary predicate that a Tribe must show to bring a damages claim against the United States for breach of fiduciary duty. In addition, because this case and *White Mountain Apache* arise under different statutory schemes, they each present that question in a different light. As a result, granting plenary review in both cases would materially assist the Court in addressing the proper application of the *Mitchell* decisions in a comprehensive manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

TODD S. AAGAARD
Attorney

MARCH 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-5086

NAVAJO NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Aug. 10, 2001

Before: NEWMAN, SCHALL, and LINN, Circuit Judges.

Opinion for the court filed by Circuit Judge PAULINE NEWMAN. Concurring in part and dissenting in part opinion filed by Circuit Judge SCHALL.

DECISION

PAULINE NEWMAN, Circuit Judge.

The Navajo Nation appeals the decision of the United States Court of Federal Claims, dismissing its complaint against the United States for breach of trust and breach of contract.[1] The court ruled that although the United States had breached its fiduciary obligations to the Navajo Nation, this breach was not actionable because the United States did not have a trust relation-

---

[1] *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000).

ship with the Navajo Nation and monetary relief was not available. However, a trust relationship indeed existed and exists with the Navajo Nation, and monetary damages are an available remedy for breach of this trust.

BACKGROUND

The United States, through the Secretary of the Interior and the Interior Department's Bureau of Indian Affairs (BIA), supervises and regulates the development and sale of mineral resources on Indian reservation lands, pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.*, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, and implementing regulations.

In 1964 the Navajo Nation entered into a lease agreement with the Sentry Royalty Company (predecessor in interest to the Peabody Coal Company) for the mining of coal deposits on Navajo lands. The agreement provided for payment of a royalty not to exceed 37.5 cents per ton, and authorized the Secretary of the Interior or his delegate to readjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. As that anniversary approached, due to increases in the market price of coal the rate of 37.5 cents per ton was equivalent to about 2% of gross proceeds. It is not disputed that this was well below then-prevailing royalty rates.

Negotiations proceeded between the Navajo and Peabody. No agreement was reached, and the Navajo asked the Department of the Interior to resolve the issue, in accordance with statute, and to set the royalty at a fair market rate. The BIA Area Real Property Management Officer issued an Initial Decision to

increase the royalty rate to 20%, based on an analysis by the Bureau of Mines. The BIA's Navajo Area Director adopted this decision, and so notified Peabody. Peabody appealed to the Deputy Assistant Secretary for Indian Affairs John Fritz, acting as both Commissioner of Indian Affairs and the Assistant Secretary of Indian Affairs, an appellate path provided by the regulations. *See* 25 C.F.R. §§ 211.2, 211.3. The Deputy Assistant Secretary for Indian Affairs considered the matter and reached a decision affirming the 20% rate. However, this decision was withdrawn at the instruction of the Secretary of the Interior. The Appendix to the decision of the Court of Federal Claims contains a memorandum from Secretary Hodel to John Fritz, Deputy Assistant Secretary for Indian Affairs, stating "I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." 46 Fed. Cl. at 237. Mr. Fritz complied with this instruction.

The record before the Court of Federal Claims reports numerous contacts during this period, on behalf of Peabody, with Interior officials including the Secretary. The Navajo were not told that a decision on Peabody's appeal had been made in their favor. Facing severe economic pressures, the Navajo eventually agreed to a royalty rate of 12.5%.

It can not be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest. The Court of Federal Claims found that the government's actions "violated the most fundamental fiduciary duties of care, loyalty and candor." 46 Fed. Cl. at 227. However, the court also held that there was no trust relationship between the

agency and the Navajo with respect to these events, and thus that no monetary relief was available.

DISCUSSION

The Fiduciary Relationship

The legal relationship between the United States and the Indian tribes takes a variety of forms, and in part is that of a fiduciary and its charge. *See, e.g., United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202, 37 L. Ed. 2d 22 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust."); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942) ("this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118, 58 S. Ct. 794, 82 L. Ed. 1213 (1938) ("As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe.")

The fiduciary relationship between the United States and the Indian tribes is manifested in various ways. For example, with respect to Indian reservation lands, precedent recognizes a distinction between the laws whereby the United States has only a limited trust relationship with the Indian tribes who occupy the land, and the laws giving rise to a full fiduciary duty toward the Indians. The difference lies in the level of control the United States exercises in its management of the land and its resources for the benefit of the Indians.

When the United States controls the Indian resources, the duty is that of a fiduciary; when the Indians control their own resources, the duty of the United States is lessened appropriately.

These relationships and duties were discussed in *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*) and 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*). The Court explained that when the United States is assigned control of the management of Indian resources and the duty to manage those resources, there is created a full fiduciary relationship with respect to that management, including all appurtenant trustee duties, obligations, and liabilities. In *Mitchell I* the Court explained that the United States' role of trustee holding title to reservation land under the General Allotment Act is simply an expedient to avoid state and local burdens, whereas the role of the United States in management of the resources of the land is as a full fiduciary, *see Mitchell II*, implementing the government's statutory obligation to manage these resources entirely for the benefit of the Indians. Thus the Court distinguished the government's holding of "bare trust" title to an Indian land allotment without responsibility to manage the resources thereof, from the government's control and management responsibility of these resources as a fiduciary:

> In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Mitchell II, 463 U.S. at 224, 103 S. Ct. 2961.

This guidance has frequently been applied. In *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996) the issue concerned the commercial leasing of land that had been allotted to Indians. The court explained that the test of the government's fiduciary responsibility is whether "the Secretary, rather than the allottees, has control or supervision over the leasing program." *Id.* at 1561. The court observed that a full fiduciary duty exists even when the government has less than total control of management of the resources, and that participation by the Indians in resource management does not absolve the United States of its responsibility to act in the sole and best interests of the Indians.

In *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), the statute establishing "an enforceable fiduciary relationship between the United States and the Tribe," *id.* at 1383, provided that Fort Apache, which had been a military facility within what later became the Tribe's reservation in Arizona, be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." This court held that the statute established a full fiduciary relationship. Although the statute was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations. This court stated:

> Although neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee.

White Mountain, 249 F.3d at 1377.

In *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001), the fiduciary breach arose from the government's mismanagement of Indian timber resources. Since the United States exercised "comprehensive control over the management and harvesting of timber on Indian reservations," the statutes and regulations established a fiduciary duty in the government to manage the resources in the interest of the Tribes. The court looked to the common law of trusts to determine the measure of damages for the government's breach of this duty, stating:

> Under trust law generally, a beneficiary is entitled to recover damages for the improper management of the trust's investment assets. In determining the amount of damages for a breach of the trustee's fiduciary duty with regard to investments of the trust property, courts attempt to place the beneficiary in the position in which it would have been absent a breach.

248 F.3d at 1371. The court recognized its obligation, upon breach of trust, to resolve any uncertainty in the measurement of damages against the trustee. See *id.* ("It is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee.")

In *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) this court held that statutes giving the Department of the Interior power and authority with respect to oil and gas leases on Native American lands imposed fiduciary obligations upon the government and provided a remedy of money damages in the Claims Court for their breach.

The Indian Mineral Leasing Act and its regulations are similar to those governing timber resources that were the subject of Mitchell II, insofar as federal authority is retained. The Mineral Leasing Act starts with the provision that no mining lease may be entered unless approved by the Secretary of the Interior:

> **25 U.S.C. § 396a.** On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, *with the approval of the Secretary of the Interior*, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(Emphasis added.) The statute and its implementing regulations give the Secretary the final authority on all matters of any significance in the leasing of Indian lands for mineral development. The statute assigns to the Secretary the broad and unqualified obligation to "protect[ ] the interests of the Indians," and includes the power to "perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the

purpose of carrying the provisions of this section into full force and effect." 25 U.S.C. § 399. Thus the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes.

Throughout the statute and its implementing regulations is seen the pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid, and the pervasive obligation to protect the interests of the Indian tribes. For example, the regulations require the written permission of the Commissioner of Indian Affairs before a Tribe can enter into negotiations for a lease rather than offer the lease in an advertised sale. 25 C.F.R. § 211.2. The regulations state the amount of bond to be secured, 25 C.F.R. § 211.6, and authorize a reduced bond if "the circumstances warrant and the interests of the Indian landowners are fully protected," 25 C.F.R. § 211.6(a). The regulations set forth the corporate information to be furnished to the appropriate officer of the Bureau of Indian Affairs, and state the officer's power to require other information. 25 C.F.R. § 211.7. The regulations control the size of coal leases by limiting them, with certain exceptions, to 2,560 acres, 25 C.F.R. § 211.9; and permit the Secretary to approve leases in excess of the acreage limitations if such approval "is in the interest of the lessor." § 211.9(b)(1). The regulations state that the shape of the leased area must be reasonably compact and conform to the system of public land surveys. 25 C.F.R. § 211.8. The regulations prescribe the term of mineral leases and the conditions of their extension. 25 C.F.R. § 211.10.

The regulations provide that royalties earned under such leases must be deposited in the Treasury "to the credit of the Indians belonging and having tribal rights

on the reservation where the leased land is located." 25 U.S.C. § 399. Royalties are paid to the superintendent "for the benefit of the lessors." 25 C.F.R. § 211.12(a). The regulations set the minimum royalties for various minerals. 25 C.F.R. § 211.15. The regulations require that no mining operations shall begin until the lease is approved by the Secretary of the Interior, and must be conducted "in accordance with the operating regulations promulgated by the Secretary of the Interior." 25 C.F.R. § 211.20. The Secretary may cancel a lease for any violation of the lease terms or regulations, and may do so without the consent of the Indian lessors. 25 C.F.R. § 211.27.

It is quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities. The statute and regulations leave no significant authority in the hands of the Indian tribes whose reservation land contains the minerals, and all procedures, responsibilities, and even details are prescribed by Act of Congress and in the regulations promulgated by the Secretary of the Interior. The statutory purpose is to protect the natural resources of the Indians and manage them in a manner that maximizes their benefit to the Indians. The Court has consistently resolved ambiguity in favor of the Indian tribes. For example, in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) the Court noted that state taxation of royalty interests would frustrate the IMLA's purpose of "ensur[ing] that Indians receive 'the greatest return from their property,'" quoting the legislative history of the IMLA.

The Indian Mineral Leasing Act's history elaborates upon the fiduciary relationship. When the Act was proposed, the Secretary of the Interior urged that the legislation be enacted because "it is not believed that the present law is adequate to give the Indians the greatest return from their property." Senate Report No. 985 at 2 (1937); House Report No. 1872 at 2 (1938). Congress responded to the need to ensure that the Indians' welfare is protected and their natural resources managed to the tribes' maximum benefit by emphasizing the Secretary's fiduciary obligations. For example, the legislative reports explained that now the Secretary would approve mineral leases only when they are "in the interest of the Indians." *Id.* Statute, regulations, and precedent place on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians. The Court of Federal Claims erred in holding that there was no authorization for a trust relationship between the United States and the Navajo Nation as to the coal resources.

Breach of the Fiduciary Relationship

The action of the Secretary in suppressing and concealing the decision of the Deputy Assistant Secretary for Indian Affairs, thereby favoring Peabody interests to the detriment of Navajo interests, was characterized by the Court of Federal Claims as "violat[ing] the most basic common law fiduciary duties owned to the Navajo Nation." 46 Fed. Cl. at 219. As that court explained:

> Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests

> adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

46 Fed. Cl. at 226. In addition to violation of common law fiduciary duties, the Secretary also violated statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo. By suppressing the royalty decision of Interior's Deputy Assistant Secretary for Indian Affairs, the Secretary acted in direct contravention of the Act's charge to the Secretary to obtain for the Indians the maximum return for their minerals. In failing to act in the best interests of the Navajo, the government violated its fiduciary responsibilities. Although the government argued, at the hearing of this appeal, that the Secretary's actions were justified in that they reflected a balance of national interests, it is hornbook law that a trustee's competing interests do not excuse a breach of fiduciary duty.

Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of "damages resulting from a breach of the trust," as confirmed in *Mitchell II*:

> This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue

> the trustee for damages resulting from a breach of the trust.

463 U.S. at 226, 103 S. Ct. 2961. The Court confirmed that "The Court of Claims therefore has jurisdiction over respondents' claims for alleged breaches of trust." *Id.* at 228, 103 S. Ct. 2961. The Court of Federal Claims erred in holding that it was without jurisdiction to grant monetary relief and improperly dismissed the complaint.

CONCLUSION

The United States breached its fiduciary obligations to the Navajo Nation in connection with these coal leases with Peabody. A claim for damages for that breach is within the jurisdiction of the Court of Federal Claims. The dismissal is reversed, and the case is remanded for further proceedings including determination of damages.

REVERSED AND REMANDED.

SCHALL, Circuit Judge, concurring-in-part and dissenting-in-part.

The Tucker Act and the Indian Tucker Act establish the jurisdiction of the United States Court of Federal Claims over certain claims against the government and constitute a waiver of sovereign immunity as to those claims. 28 U.S.C. §§ 1491, 1505 (1994). However, those statutes, by themselves, do not create "any substantive right enforceable against the United States for money damages." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*") (citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed .2d 607 (1980) ("*Mitchell I*") (discussing the Tucker Act and Indian Tucker Act)). For a claimant to state a claim upon which relief can be

granted, a substantive right for money damages "must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Mitchell II*, 463 at 216, 100 S. Ct. 1349 (quoting 28 U.S.C. § 1491). In this case, the Navajo Nation ("Nation") asserts a claim for money damages against the government based upon alleged breaches of the government's trust obligations to the Nation.

I.

The Supreme Court, in *Mitchell I*, addressed the issue of under what circumstances fiduciary obligations are created and breached so as to establish a claim for money damages contemplated by the Tucker Act and Indian Tucker Act. In *Mitchell I*, the Quinault Tribe alleged, under a breach of trust theory, that it was entitled to recover money damages in the United States Court of Claims, one of our predecessor courts, for the government's mismanagement of its timber resources. 445 U.S. at 537, 100 S. Ct. 1349. The Tribe alleged that a trust was established by the General Allotment Act of 1887 (codified at 25 U.S.C. § 331 *et seq.*). However, the Court held that the Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the [g]overnment to manage timber resources." *Id.* at 542, 100 S. Ct. 1349. The Court determined that the Act did "not unambiguously provide that the United States ha[d] taken full fiduciary responsibility as to management of allotted lands," in particular, the management of timber resources on the allotted lands. *Id.* at 542-43, 100 S. Ct. 1349. The Court concluded that the General Allotment Act did not establish that the government had a fiduciary duty to manage the Tribe's forest lands; therefore,

the Tribe's ability to recover money damages for the government's actions had to be found "in some other source than the Act." *Id.* at 546, 100 S. Ct. 1349.

The Supreme Court revisited the Quinault Tribe's claim for money damages in *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961, where the Court held that there was a fiduciary relationship between the government and the Tribe. The Court found statutes and regulations that "establish[ed] the 'comprehensive' responsibility of the [government] in managing the harvesting of Indian timber," with "[v]irtually every stage of the process . . . under federal control." *Id.* at 222, 103 S. Ct. 2961 (citations omitted). From these statutes and regulations, the Court determined that "a fiduciary relationship necessarily arises when the [g]overnment assumes such elaborate control over forests and property belonging to Indians." *Id.* at 225, 103 S. Ct. 2961. The Court stated that the very statutes and regulations that create the fiduciary relationship also "define the contours of the United States' fiduciary responsibilities." *Id.* at 224, 103 S. Ct. 2961. The Court concluded that the Court of Claims had jurisdiction over the Tribe's claims that the government had violated its fiduciary obligations in management of the Tribe's timber land. *Id.* at 228, 103 S. Ct. 2961.

This court applied the Court's teachings in *Mitchell I* and *Mitchell II* in *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987). In *Pawnee*, the Cheyenne-Arapaho Tribe claimed that the government had breached its fiduciary obligation to receive gas royalties computed at the highest market value for two of the Tribe's oil and gas leases. *Id.* at 188-89. In addressing this claim, we first considered whether there was "any general fiduciary relationship" between the Tribe and the

government. *Id.* at 189. We found such a relationship, noting that the Indian Long-Term Leasing Act, codified at 25 U.S.C. § 396, placed the Secretary of the Interior "at the center of the leasing of Indian mineral lands." *Id.* We also pointed to certain accompanying regulations as evidence of the government's involvement in all aspects of the leasing arrangement. *Id.* at 190. We concluded, based on these statutes and regulations, "that the United States has a general fiduciary obligation toward the Indians with respect to the management of [the] oil and gas leases." *Id.*

We noted, however, that the existence of a general fiduciary relationship "does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trusta claim which must be fully tried in the Claims Court." *Id.* at 191. We looked to the statutes and regulations that established the fiduciary relationship and noted that the Tribe's claim ran counter to the requirements of the governing regulations, which expressly restricted the highest price for a majority of the oil and gas produced on the leased land. *Id.* We also noted that "the fiduciary relationship springs from the statutes and regulations" that define the relationship, and that the Tribe had failed to allege the violation of any specific statute or regulation. *Id.* We concluded that, under *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship, and that the Tribe could not create a "viable fiduciary claim purely by insisting that this court (or the Claims Court) establish different or higher standards" than those established by law. *Id.* at 192. We therefore found that the Tribe had failed to state a proper claim for breach of trust, and affirmed the dismissal of its claim. *Id.*

We revisited *Mitchell I*, *Mitchell II*, and *Pawnee* in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996). Brown, and other Indians, alleged that the government had breached a fiduciary duty imposed by 25 U.S.C. § 415 and 25 C.F.R. part 162[2] by failing either to compel the Indians' lessees to fulfill their reporting and payment responsibilities or to cancel the leases. *Brown*, 86 F.3d at 1557. As we did in *Pawnee*, we first looked to see if a fiduciary relationship existed between the Indians and the government with respect to the leased properties. *Id.* at 1559-61. We noted that, under *Mitchell II*, the test for determining whether there was such a relationship was whether the government "takes on or has control or supervision over the tribal monies or properties" that are at issue. *Id.* at 1560 (quoting *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961). We termed this the "control or supervision test" and noted that nearly complete government management was not necessary to create a fiduciary relationship. *Id.* at 1560-61. Applying these standards, we found that the government did control the Indians' leasing program enough to created an enforceable fiduciary duty. *Id.* at 1561-62. This established a general fiduciary duty, but we noted that the Indians still needed to allege a breach of a specific statutory requirement or regulation to sustain a money claim against the government. *Id.* at 1563.

---

[2] Section 415 provides that Indian lands may be leased by those tribes or individuals who own them with the approval of the Secretary of the Interior. 25 U.S.C. § 415. Section 415 also indicates that such leases are made under the terms and regulations established by the Secretary, which include those regulations found in 25 C.F.R. part 162. 25 U.S.C. § 415.

We reiterated that the statutes and regulations that create the general fiduciary relationship define the scope and extent of the fiduciary relationship. *Id.* We concluded that, on the record before us, it was not clear that the Indians had "alleged the breach of a specific duty that the regulations squarely place on the [government]." *Id.* Accordingly, we remanded the case for the trial court to determine whether the Indians "alleged the breach of a specific duty that the regulations squarely place[d] on the [government]." *Id.*

Recently, in *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), we found an enforceable fiduciary relationship between the White Mountain Apache Tribe and the government whose breach could give rise to a claim for money damages. First, we determined whether there was a fiduciary relationship between the Tribe and the government regarding buildings and land at Fort Apache, which is within the borders of the Tribe's reservation in Arizona. *Id.* at 1376-77. We found such a relationship existed, based on a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960), to the extent that the government controlled and used the buildings and land at Fort Apache. *Id.* at 1373-77. Then, we determined the government's obligations under this fiduciary relationship, first looking to the common law of trusts to define the nature of the government's obligations. *Id.* at 1377-80. We found that general principles of trust law required the government to use "reasonable care and skill" to preserve the buildings and lands at the fort with respect to which the government had a fiduciary duty to the Tribe. *Id.* at 1379 (citations omitted). We stated: "[I]n each case, we must . . . examine the particular statute, treaty, 'or other fundamental document,' that

creates the trust relationship in order to determine the nature of the relationship and whether the general law of trust has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations." *Id.* at 1380 (citations omitted). We concluded that the Tribe had stated a proper claim for money damages, but pointed out that just because there was a general fiduciary relationship did not mean that every claim by the Tribe was meritorious. *Id.* at 1383 (citing *Pawnee*, 830 F.2d at 191).

With the legal framework established, I now turn to the facts of this case.

II.

In 1964, the Nation entered into Lease 8580 (the "1964 Lease") with Sentry Royalty Company, the predecessor in interest of Peabody Coal Company ("Peabody"), for the mining of coal on the Nation's land at a royalty rate of not more than 37.5 cents/ton. Article VI of the 1964 Lease provides as follows:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In 1984, after negotiations between the Nation and Peabody proved unproductive, the Nation requested, under Article VI, that the Bureau of Indian Affairs ("BIA") raise the royalty rate. BIA, which is part of the Department of the Interior ("DOI"), initially determined that the rate should be raised to 20% of the gross value of the coal mined. Peabody appealed that decision to the Commissioner of Indian Affairs in the DOI, pursuant to the procedures outlined in 25 C.F.R. part 2. Although the official handling the appeal was prepared to issue a decision affirming the 20% royalty rate, then-Secretary of the Interior Donald Hodel requested that release of the decision be delayed. Consequently, both Peabody and the Nation were informed by DOI that a decision on the appeal was not imminent and that they should try to negotiate. Unbeknownst to the Nation, prior to acting on the matter, Secretary Hodel had met with representatives of Peabody who had asked the Secretary to delay the release of DOI's decision.

Peabody and the Nation resumed negotiations, and in 1987, an agreement was reached with respect to renegotiation of the 1964 Lease (the "Agreement"). In addition to amending the lease by raising the royalty rate to 12.5%, the Agreement also addressed other matters, including confirming the Nation's ability to tax Peabody, amending two other leases by raising their royalty rates to 12.5%, adding provisions for future royalty adjustments, establishing a tribal scholarship fund, and requiring the payment by Peabody of certain back royalties, bonuses, and water payments. The Agreement was submitted to DOI for review, and DOI formally approved the Agreement on December 14, 1987.

The Nation filed suit against the government in the Court of Federal Claims on December 14, 1993. The Nation charged that the government had breached its fiduciary duties to the Nation, based on Secretary Hodel's ex parte communications with Peabody, DOI's alleged failure to properly oversee negotiations between Peabody and the Nation, and DOI's final approval of the Agreement, which only raised the 1964 Lease's royalty rate to 12.5%, instead of 20%. The Nation also alleged that the government had breached contractual obligations under Article VI of the 1964 Lease by approving the Agreement. Both the government and the Nation moved for summary judgment on these claims.[3]

The Court of Federal Claims first rejected the government's contention that the Nation's claims were time-barred. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 224-25 (2000). The court then discussed the Nation's breach of trust claim, first looking at the claim under general trust principles. Id. at 226-27. The court concluded that the government's ex parte communications with Peabody and its following actions during the royalty adjustment proceedings violated the "most fundamental fiduciary duties of care, loyalty and candor." *Id.* at 227. The court noted, however, that in order for the Nation to succeed on its money claim against the government, it had to show that some statute, treaty, regulation, or other source of law imposed specific fiduciary obligations on the government and

[3] The government acknowledges that the Court of Federal Claims had jurisdiction over the Nation's claims, and that it thus was proper for the court to reach the merits of those claims and entertain motions for summary judgment.

that the government had violated those fiduciary obligations. *Id.* at 227-28.

The court first addressed whether the government had a general fiduciary obligation with regard to coal leases on Indian land, focusing on the amount of management and control the government assumed over such leases. *Id.* at 228. In that regard, the court considered the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (1938) (codified at 25 U.S.C. §§ 396a-396g) ("IMLA"), and the accompanying regulations, 25 C.F.R. part 211 (1985). *Navajo Nation*, 46 Fed. Cl. at 228-30. The court determined that, while the level of management and control exercised by the government over oil and gas leases may be enough to establish a fiduciary obligation, the government's level of control over coal leases, and in particular coal royalties, is not enough to "rise above a generalized trust obligation." *Id.* at 231-33. In addition, the court concluded that even if a fiduciary obligation does exist, the Nation failed to "link any breach [it alleged] to a specific money-mandating statutory or regulatory provision." *Id.* at 233-34.

The court also found that the government owed no contractual obligation toward the Nation under the 1964 Lease. *Id.* at 234. The court pointed out that the government was not a party to the lease, and that no consideration had passed to the government under the 1964 Lease from either the Nation or Peabody. *Id.* at 234-35. Finally, the court dismissed the Nation's claim that there was an implied-in-fact contract between the government and the Nation with respect to the revision of the royalty rate of the 1964 Lease because there was no intent to contract by the government, no consideration to the government, and no clear offer and acceptance by the government.[4] *Id.* at 236. Based on its findings, the Court of Federal Claims granted the government's motion for summary judgment and dismissed all of the Nation's claims. *Id.*

III.

On appeal, the Nation argues that the government has general fiduciary obligations to it with respect to coal leases involving Indian land, and that, in this case, the government breached those obligations. Specifically, the Nation asserts that IMLA requires the government to review all leases and lease amendments in order to assure that they are in the best interests of the Indians and that Indian profits are maximized. The Nation contends that the government breached this obligation by prohibiting a 20% royalty rate and approving the Agreement for a lower royalty rate of 12.5%. The Nation also contends that the government violated its general fiduciary duties of care, candor, and loyalty to the Nation by preventing the royalty rate adjustment of 20%, engaging in ex parte communications with Peabody, misleading the Nation into resuming negotiations with Peabody, and approving the Agreement to amend the 1964 Lease without review.

The Nation further argues that the government violated 25 U.S.C. § 396a and 25 C.F.R. § 211.2 by approving the Agreement without any economic analysis. The Nation contends that the government violated 25 C.F.R. § 211.2 by colluding with Peabody to compel further negotiations and by failing to supervise the negotiations. The Nation states that DOI, by allowing a low royalty rate in the Agreement, violated the mini-

[4] The Nation does not appeal the Court of Federal Claims' dismissal of its breach of contract claims.

mum royalty rate established by 30 U.S.C. § 207(a) and the BIA Manual ("BIAM"), 54 BIAM § 604.05. According to the Nation, the government violated the DOI Manual, 130 DM 10.5, and the BIA Manual by failing to perform any economic analysis before approving the Agreement to amend the 1964 Lease. Finally, the Nation argues that the government violated Article VI of the 1964 Lease by preventing a "reasonable" royalty adjustment that was explicitly required by the Lease. The Nation concludes that these specific violations of the government's fiduciary duties entitle it to monetary damages against the United States.

The majority concludes that IMLA and the accompanying regulations, "assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities." Majority, op. at 1331. Based on this finding of supervision and control, the majority determines that a trust relationship is created, giving the government "a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." *Id.* at 1332. The majority holds that the Court of Federal Claims erred in finding no trust relationship between the government and the Nation with regard to the Nation's coal leases. *Id.* at 1332. Next, noting that the lower court found that Secretary Hodel's actions with respect to BIA's initial royalty rate decision violated common law fiduciary duties owed to the Nation, the majority concludes that the Nation has stated a claim upon which monetary relief can be granted. Id. at 1332. The majority also finds that what it characterizes as the Secretary's "suppression and concealment" of BIA's decision "acted in direct contravention of the [IMLA's] charge to the Secretary

to obtain the Indians the maximum return for their minerals." *Id.* at 1332. It therefore reverses the decision of the Court of Federal Claims dismissing the complaint and remands for further proceedings. Id. at 1333.

I agree with the majority that IMLA and the regulations at 25 C.F.R. part 211 create a scheme under which the government plays a major role in mineral leasing on Indian land and that, therefore, there exists a general fiduciary relationship between the Nation and the government regarding coal leases, such as the 1964 Lease at issue here.

It is at this point, however, that I part company with the majority. A court first must decide whether a general fiduciary relationship exists in a particular area between Indians and the government. Then, it must determine whether, in the context of that relationship, the government has breached any specific fiduciary responsibilities. It makes this determination by considering the government conduct at issue in light of the requirements of the statutes and regulations that create the general fiduciary relationship in the first place. *See Brown*, 86 F.3d at 1563; *see also Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961 (noting that "the statutes and regulation now before us . . . establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." (emphasis added)); *White Mountain Apache Tribe*, 249 F.3d at 1377-80 (determining, after finding a fiduciary relationship, what the government's specific obligations are and whether the statute that created the relationship altered the general law of trusts in any way); *Pawnee*, 830 F.2d at 191 (stating that the existence of a "general fiduciary relationship does not mean that any and every

claim by the Indian lessor necessarily states a proper claim for breach of the trust"). In this case, the majority properly undertakes the first step of the analysis but not the second. After concluding that a general fiduciary relationship exists between the government and Indians with respect to the mining of coal on Indian lands, the majority, focusing exclusively on Secretary Hodel's actions relating to BIA's royalty decision, fails to properly conduct the required second step of the analysis. I believe the majority errs in two respects: first, it fails to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship; second, it only considers one aspect (Secretary Hodel's actions relating to BIA's royalty decision) of the overall government conduct that is at issue.

IV.

In my view, the only government action in this case that implicated a specific fiduciary responsibility to the Nation was DOI's approval of the Agreement. The Nation and Peabody submitted the Agreement to DOI for review. DOI indicated, in an internal report, that it was reviewing the Agreement pursuant to DOI's powers of lease approval under 25 U.S.C. § 396a and the regulations under 25 C.F.R. part 211, sources of law that establish a fiduciary relationship between the Nation and the government. Thereafter, when DOI approved the Agreement, it invoked its approval powers under 25 U.S.C. § 396a and 25 C.F.R. § 211.2, both of which subject the leasing of mineral rights on Indian land to DOI approval.[5] The government's obligation

[5] The Nation also argues that 25 C.F.R. § 211.2 places upon the government the obligation of overseeing negotiations for leases and lease amendments. However, the regulation does not discuss the government supervising lease negotiations. As § 211.2 indicates, the Secretary makes a decision regarding negotiations only if (1) the Indians do not want to take bids and request a negotiation or (2) a negotiation is granted in lieu of bidding and the negotiated document is submitted to the government. Neither situation is present in this case.

under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 is to either approve, or disapprove, a lease, or lease amendment, and since this obligation falls within "the contours of the United States' fiduciary responsibilities," *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961, the government must make its approval decision with the reasonable care and skill demanded of a trustee, *White Mountain Apache Tribe*, 249 F.3d at 1378-79. It is undisputed that, when deciding whether to approve the amendment of the 1964 Lease, DOI failed to perform any economic analysis regarding the lease amendments. In my view, this failure constituted a breach of a fiduciary obligation owed to the Nation. I believe it is reasonable to conclude that one aspect of the lease approval obligation is determining whether a proposed lease is financially beneficial for the Indians involved. *See Restatement (Second) of Trusts* § 174 (1959) (noting that a trustee is under a duty to the beneficiary to administer the trust with reasonable care and skill); *Cheyenne-Arapaho Tribes of Ok. v. United States*, 966 F.2d 583, 589-91 (10th Cir. 1992) (requiring the Secretary of the Interior to consider relevant economic factors before approving a communization agreement under 25 U.S.C. § 396d of IMLA). I do not believe, however, that any of the other breaches that are alleged by the Nation implicate a fiduciary obligation on the part of the government so as to give rise to a claim for monetary damages against the United States.

Initially, the Nation alleges general violations of the common trust obligations of care, candor, and loyalty. In making this allegation, the Nation points to the ex parte communications between Secretary Hodel and Peabody and DOI's failure to secure a 20% royalty rate. While these duties, based on the common law of trust, are relevant to determining the government's obligations, *White Mountain Apache Tribe*, 249 F.3d at 1377-78, the scope and extent to which these obligations apply to governmental action is governed by the statutes and regulations that create the fiduciary relationship, id. at 1380. *See also Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961; *Brown*, 86 F.3d at 1563. The Nation must explain how DOI's actions, which may demonstrate disloyalty to the Nation in a vacuum, fall within the boundaries of a specific fiduciary obligation. That it has not done.

The Nation also alleges violations based on internal agency policy, expressed in BIA Manuals, 54 BIAM § 604.5 for example, and DOI manuals, 130 DM 10.5 for example. Neither of these manuals, or general agency policy, can support a claim for monetary damages because a substantive right to monetary relief must be found "in some . . . source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Mitchell II*, 463 U.S. at 216, 103 S. Ct. 2961 (citing 28 U.S.C. s 1491). The Nation fails to show how these manuals "can be fairly interpreted to create a substantive right to monetary compensation from the United States," *Hamlet v. United States*, 63 F.3d 1097, 1102 (Fed. Cir. 1995).

The same analysis applies to the Nation's claims based upon Article VI of the 1964 Lease and DOI's actions relating to the review of BIA's initial royalty

rate decision. While the language of Article VI states that the government will, after 20 years, raise the royalty rate under the Lease to a reasonable rate, the 1964 Lease is not a document by which the government is bound. Consequently, actions under the Lease are not within the contours of the government's fiduciary relationship with the Nation. As the Court of Federal Claims correctly noted, the government was not a party to the 1964 Lease and there is no evidence of an intent by the government to assume any contractual obligations under the Lease. *Navajo Nation*, 46 Fed. Cl. at 235-36. Finally, the government's actions during the review of BIA's initial decision to raise the royalty rate to 20%, including Secretary Hodel's *ex parte* communications with Peabody and his actions relating to BIA's royalty decision, occurred in the context of DOI's review of an internal decision, under 25 C.F.R. part 2, not in the context of a fiduciary responsibility regarding mineral leases arising under IMLA. The Nation also asserts a breach of trust based on 30 U.S.C. § 207(a), which establishes a minimum royalty rate for coal leases of 12.5%. Section 207(a), which applies to federal land in general, did not apply to leases of Indian land until 1996, when 25 C.F.R. § 211.43(a)(2) was promulgated. The government was not required to conform to the standards set in 30 U.S.C. § 207(a), because, at the time of the government's actions in this case, § 207(a) did not apply to Indian land.

In sum, I agree with the majority that a general fiduciary relationship exists between the government and the Nation with respect to coal leases on the Nation's lands. However, the analysis cannot stop there. In order to state a claim upon which relief can be granted, the Nation must show the breach of a specific

fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue. In my view, the only conduct that is alleged in this case that implicates a specific fiduciary obligation owed by DOI to the Nation is DOI's failure to perform an economic analysis on the Agreement between Peabody and the Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2. I believe that this failure amounted to a breach of a fiduciary obligation owed to the Nation. I would remand the case to the Court of Federal Claims for the limited purpose of determining what damages, if any, the Nation suffered as the results of that breach. Otherwise, I would, in all respects, affirm the decision of the Court of Federal Claims.

For the foregoing reasons, I respectfully concur-in-part and dissent-in-part.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Feb. 4, 2000

OPINION

BASKIR, Judge.

Mr. Donald Hodel, Secretary of the Interior during the critical period of this dispute, offered this denunciation of *ex parte* contacts in his deposition:

> The decision-maker isn't suppose (sic) to talk to one of the two sides while he is in the process of making a decision or may be in the process of making a decision. And it goes to fundamental fairness.
>
> * * * * * *
>
> I should go further in saying one other thing, that the *ex parte* communication taints the subsequent decision. So that even if you would have made exactly the same decision, you can never establish that, if you are challenged on it.

> So it's folly to engage in *ex parte* communications. And I would expect people who dealt with me inside and outside the Department would have known that I would have been pretty firm on that as a matter of practice.

Deposition of Donald P. Hodel, November 20, 1995; I Plaintiff's Appendix (Pl. App.) at 1149-50.

Although Mr. Hodel's memory fails him on this point, the evidence is overwhelming that he did what he condemns. On or about July 17, 1985, he met with a personal friend who had been hired a few days earlier, solely because of his access, by one party in a royalty dispute with the Navajo Nation. The Secretary sided with his friend's new employer in this brief *ex parte* meeting, a meeting which remained undisclosed for eleven years until revealed inadvertently during discovery in this case.

Mr. Hodel might well have added that ex parte contacts, especially those that result in decisions worth millions of dollars to the party with special access to high officials, betray the public trust and transgress the high ideals of public service. Not incidentally, by his conduct Mr. Hodel also violated basic fiduciary duties owed the plaintiff in this action, the Navajo Nation.

Mr. Hodel's July 1985 meeting forms the dramatic centerpiece in the Navajo Nation's suit for breach of trust and breach of contract against the United States. However, it is not the act which the plaintiff contends constitutes the government's specific wrongs. Both breaches allegedly arise from the entire series of events which ultimately resulted in the December 1987 approval by Mr. Hodel of royalty revisions to one of the

Navajo Nation's coal leases with Peabody, the subject of that earlier meeting.

According to plaintiff, by this approval the Secretary breached fiduciary duties owed the Navajo Nation under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.* (IMLA) and related treaties and regulations, and breached contractual obligations under the coal lease itself. The present matter comes before the Court on cross-motions for summary judgment on the issue of liability.

We conclude that the defendant, acting through former Secretary Hodel, violated the most basic common law fiduciary duties owed the Navajo Nation. Regrettably, we also conclude that the trust relationship necessary for our jurisdiction does not exist, and these violations do not mandate monetary relief, both as required by our jurisdictional precedents. We also conclude that the government owed no contractual duty to the plaintiff. We are thus compelled to deny plaintiff's motion for summary judgment and to grant the government's cross-motion.

The Dispositive Motions In Context

A number of related matters require mention at this early juncture to place this Opinion in context. In February 1999, prior to oral argument on these motions, the Navajo Nation filed a collateral lawsuit in United States District Court for the District of Columbia. *The Navajo Nation v. Peabody Holding Company, Inc., et al.*, No. CA-99-469-EGS (D.D.C.). Plaintiff named as a defendant, Peabody, the lessee at the heart of our case. Plaintiff's claims against Peabody evolve out of the same factual context. Also currently pending before our Court is Peabody's motion to find plaintiff in

contempt in connection with the Navajo use in District Court of materials produced in discovery pursuant to a Confidentiality and Protective Order, entered February 26, 1996, in our litigation. Plaintiff subsequently filed a motion asking this Court to determine the status of those same materials, some of which plaintiff claims are not properly subject to the protective order.

In this Opinion, we no doubt make use of documents and information that are the subject of both these motions. However, in preparing this Opinion, we have relied only on the pleadings and other matters of public record. Those pleadings were received in unredacted form and were filed publicly. To this day, Peabody has not sought to apply the protective order to these filings and thereby remove them from the public domain. Although we reserve ruling on the motions respecting plaintiff's activities in District Court and the status of the protected documents, we view any objection by Peabody to inclusion of protected documents in this Opinion as waived.

SUMMARY OF ISSUES

At issue in plaintiff's first claim for relief is the scope of the Secretary's fiduciary duties, if any, under IMLA. Do those duties establish a trust relationship between the United States and the Navajo Tribe the violation of which gives rise to a claim for money damages in this Court? The Navajo Nation has asserted that the statute imposes a host of strict fiduciary duties upon the government and that each of those duties has been clearly breached. In particular, the Navajo Nation contends the statute imposes a fiduciary obligation to maximize the financial returns from coal leases; in this case, a fiduciary duty to require a twenty percent

royalty rate for the Peabody lease. The Secretary's 1987 approval of a rate of 12.5 percent violates this duty.

The government counters that plaintiff's claim is not properly before the Court. First, plaintiff has failed to establish subject-matter jurisdiction in this Court. The trust relationship imposed by IMLA is of so limited a nature, it argues, that it cannot serve as the basis for a claim for money damages. Second, the Navajo's claim is barred by the statute of limitations. Failing those arguments, the government maintains that it is entitled to summary judgment because the Secretary satisfied any fiduciary duties owed the Navajo Tribe.

With the Navajo's second claim for relief, breach of contract, the Court faces issues of fundamental contract formation. Plaintiff alleges that the Secretary violated the pertinent coal lease to which the government was a party when he failed to provide a "reasonable adjustment" of the royalty according to the lease provisions, twenty percent being that reasonable adjustment. In the alternative, plaintiff argues under a contract implied-in-fact theory that the government failed to act in good faith and treat the parties fairly in reviewing and approving lease amendments between the Navajo Nation and the private parties involved in this dispute.

The government denies that the lease formed any contractual relationship between the Secretary and the Navajo Nation. Alternatively, defendant argues that to the extent any contractual duties have been created, the Secretary has sufficiently carried them out. Furthermore, defendant alleges that the breach of contract claim, like the breach of trust claim, is barred by the six-year statute of limitations.

The Court finds the government's statute of limitations argument without merit. However, the statutory and regulatory provisions upon which the Navajo Nation relies are not "money-mandating" as required under the Tucker Act, 28 U.S.C. § 1491 (1988), or the "Indian Tucker Act," 28 U.S.C. § 1505 (1999), to invoke the jurisdiction of this Court and to afford the requested relief. Plaintiff's breach of contract theory is equally unavailing. As we will explain, the Court finds as a matter of law that the Secretary is not a contractual party to the lease in question.

BACKGROUND

A firm grasp of the extensive history of this case is indispensable to an understanding of the trust relationship between the United States and the Navajo Tribe in the mineral leasing context. The parties have spared no detail in describing the background of this case in their briefs and argument. The Court held two hearings on dispositive motions, the first of which exceeded five hours. For the most part, the following series of events is undisputed, and subject only to interpretation.

Introduction

On February 1, 1964, the Navajo Nation, a federally recognized Indian tribe, entered into Lease 8580 with the Sentry Royalty Company for the mining of coal on tribal lands. Pursuant to the Indian Mineral Leasing Act the Assistant Area Director of the Bureau of Indian Affairs (BIA) approved the lease on August 28, 1964, under authority delegated by the Secretary of the Interior.

The original lease provided for an extremely low royalty rate of not more than 37.5 cents per ton, but Article VI allowed the Secretary or his delegate to

adjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. Ultimately the Secretary did not exercise this authority. Instead, on December 14, 1987, he approved amendments to the lease, negotiated by the parties, establishing a royalty rate of 12.5 percent.

A few years earlier, in anticipation of the maturity of Article VI, the Navajo Nation had instituted proceedings in the Department of Interior (DOI) with a view toward converting the royalty to a percentage basis, and dramatically boosting its level. At this time, the rate for coal leases on federal lands was 12.5 percent, which the Navajo considered a minimum. Indeed, the first-level DOI authority's initial decision in June 1984 was to increase the royalty to a rate of twenty percent. The lessee, Peabody Coal Company, Sentry's successor in interest, appealed that decision.

By mid-summer 1985 it was apparently well-known to all parties that the BIA planned to deny the appeal and affirm the twenty percent rate. The Secretary then intervened and directed that the decision on Peabody's appeal be deferred so that the parties to the lease could negotiate a royalty rate. This directive, the events leading up to it, and the Secretary's subsequent approval of a lease package the parties negotiated, form the basis of plaintiff's breach of trust and contract claims. With this outline in mind, we now examine the events and their legal context in more detail.

Basis of Trust Relationship

Two treaties—the 1849 Treaty and the 1868 Treaty —form the foundation of the trust relationship between the United States and the Navajo Nation. See 9 Stat. 974; 15 Stat. 667. Under the 1849 Treaty, the United

States assumed the responsibility to regulate trade and intercourse with the Navajo and to secure their permanent prosperity and happiness.

The principles of the treaties were echoed in the policies and procedures established by the United States. The BIA was established as an agency within DOI in order to encourage and train Indians to manage their own affairs and to utilize fully their natural resources under the trust relationship. As early as 1975 it was DOI policy to provide technical assistance to assure that development of coal resources provided a fair monetary return. Furthermore, the Code of Federal Regulations and departmental manuals governing the affairs of Interior and its agencies establish procedures intended to prevent private industry from exploiting Native Americans in the management of their resources. These measures range from placing limitations on the tribe's negotiations to providing technical and economic support for mineral management.

The Royalty Rate Revision of Lease 8580

The cents-per-ton basis of determining royalties under the original 1964 lease was, by any measure, an inequitable deal for the mineral owner. In fact, in 1977 Congress set a 12.5 percent minimum royalty rate for federal strip-mined coal, and the Department of the Interior adopted a policy prohibiting the federal trustee of Indian coal from approving a tribal coal lease with royalties less than that amount.

During this same period, it was noted that Lease 8580 violated several of the limitations later put in place by the DOI and BIA. Economic studies, some commissioned by federal agencies, confirmed that the royalty rate was not providing the Navajo a fair return for

their coal. It is in this context that on June 18, 1984, Donald Dodge, the BIA Navajo Area Director, implemented Article VI and significantly raised the royalty rate to twenty percent. This decision was made under delegated authority of the Secretary of Interior, and in consultation with the Department of Justice.

Appeal of the Rate Adjustment

Not surprisingly, the prospect of such a significant increase in the cost of coal concerned Peabody and its major utility customers, Southern California Edison Company and the Salt River Project Agricultural Improvement and Power District (collectively, the "companies"). The companies appealed the Area Director's decision formally in July 1984. However, the record also establishes parallel *ex parte* attempts on behalf of industry representatives to communicate with those deciding the appeal. Whether these attempts sought to overturn the adjusted rate or merely to defer the decision on appeal is not clear. What is clear is that they were rebuffed by then-Secretary William P. Clark, who had a firm policy against *ex parte* meetings. The Navajo were apparently not apprised of the efforts.

John Fritz, Acting Assistant Secretary of Interior for Indian Affairs, the decision-maker on Peabody's appeal, took the matter under consideration. In March 1985, Mr. Fritz granted the companies' petitions to supplement their briefs, and asked them for additional cost, revenue and investment data. This request apparently led the companies to suspect that the decision was going to be favorable to the Navajo.

On April 16, 1985, the Supreme Court decided *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985). That case

upheld Navajo taxes that had been contested by the companies, and supported the Navajo Nation's position that it was entitled to obtain maximum revenues from its mineral leases. This confirmation of tribal authority no doubt concerned the companies, and arguably improved the bargaining position of the Navajo, who had broken off negotiations on lease amendments in November 1984 to await a decision on the appeal.

In June 1985, the decision document affirming the Area Director's decision awaited Mr. Fritz's signature. The companies learned that a decision affirming the twenty percent adjustment was imminent. On July 5, 1985, Peabody wrote a letter to Secretary Hodel requesting he postpone decision on the appeal and force the Navajo to negotiate. This letter was provided to the Navajo Nation, which promptly rejected further negotiations and urged DOI to decide the appeal with all deliberate speed.

However, the Navajo were not made aware of other lobbying efforts aimed at delaying the rate decision. Early in July 1985, Peabody retained Stanley Hulett, a former high-level DOI employee and close personal friend of the new Secretary. Mr. Hulett had been recommended by Southern California Edison Company, one of the power plant customers which relies upon the coal mined by Peabody. There is little doubt that Mr. Hulett met with Secretary Hodel, probably on July 17. On July 22, 1985, a Peabody attorney named Edward Sullivan drafted an internal company memorandum describing what transpired in the meeting. The memorandum demonstrates that even Peabody attorneys speculated on "whether this activity would be considered an '*ex parte*' contact as part of Peabody's appeal

of the Navajo Area Director's decision." *See* I Pl. App. 595-96.

On or shortly after the date of the ex parte meeting, Secretary Hodel signed a memorandum prepared by Peabody, making only one insignificant change in the company's draft. Copies of the draft and the version signed by the Secretary are attached as appendices to this Opinion.

In the memorandum, melodramatically described by a former DOI official as a "march or die" order, Secretary Hodel instructed Mr. Fritz not to issue the appeal decision affirming the twenty percent rate. Instead, he adopted the companies' preference and directed negotiations. Mr. Fritz, who subsequently made no secret of his sympathy for the Navajo Nation and his unhappiness with these developments, resigned in August, pursuant to an earlier decision.

Secretary Hodel's directive was not revealed to the Navajo Nation. Instead, on August 29, 1985, well after the Secretary's order deferring the rate decision in favor of negotiations, the Navajo Nation was informed or, more accurately, misinformed:

> The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal by Peabody of the Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.
>
> As you are aware the briefing schedule has been completed and a *decision on the appeal is currently being considered* by the Deputy Assistant Secretary —Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding

settlement but *the decision has not yet been finalized.*

I Pl. App. at 622 (Letter from Tim Vollman, Associate Solicitor, Indian Affairs) (emphasis added).

Events then moved at a rapid, albeit puzzling pace. Despite the apparently imminent favorable decision on their twenty percent rate adjustment, in the face of an eight year history of desultory negotiations with the companies, and despite a firm refusal re-iterated just a month earlier to resume talks pending a decision on the Dodge royalty adjustment, the Navajo Nation changed course immediately and dramatically.

Promptly upon receipt of Mr. Vollman's letter, the Navajo Nation abandoned its five-year effort to have the rate revised by the DOI, and on August 30, 1985, resumed discussions with Peabody that had broken off a year earlier. They quickly reached a tentative agreement within a month, by September 23, 1985. This agreement, negotiated under the auspices of Chairman Peterson Zah, was noteworthy for its adoption of the 12.5 percent federal royalty rate, nowhere near the twenty percent rate under appeal. The agreement initially failed to get Tribal Council approval, but it survived without major change an insurgent victory by Peter MacDonald later that year for Navajo Nation leadership. (MacDonald, as Chairman, had begun negotiations with Peabody back in 1979). In late 1987, essentially the same agreement was formally approved by the Navajo Nation and referred to DOI for review.

The abrupt abandonment of their effort to have DOI set a high royalty rate at the moment of its apparent success, and the Navajo Nation's return to negotiations they had broken off and had steadfastly refused to

resume, defy explanation on this record. So does the breathtaking speed with which the parties reached an agreement that had eluded them for so many years. The record is bare of any formal communication by the Navajo Nation on the status of the appeal between September 1985 and December 1987, although there is a suggestion of an isolated and unsuccessful inquiry in 1986 or 1987.

The Navajo Nation has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results. At most they admit that "someone from Washington" had urged a return to the bargaining table. No less intriguing and unexplained is the fact that the agreement reached in September 1985, with its 12.5 percent rate, survived without change in the face of political upheavals in the Navajo Nation leadership.

The Negotiated Amendments

Apparently the favorable decision in *Kerr-McGee* prompted Mr. Zah to expand the scope of negotiations on the royalty rate adjustment to other topics such as tax matters. Consequently, the renegotiated agreement encompassed not only a 12.5 percent royalty on Lease 8580, but confirmed the validity of tribal taxation. It also raised the royalty rate to 12.5 percent on two other leases which were not by their terms subject to rate revision. The agreement also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments. And, as the government points out, the agreement obviated a long, costly and uncertain legal challenge by Peabody.

Soon after a tentative agreement had been reached, the tribal leadership passed to Peter MacDonald, who quickly reached essentially the same deal with the companies by the fall of 1985, preserving the adjustment of the royalty rate at 12.5 percent. The Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties. The tax increases that the companies would likely face in light of the *Kerr-McGee* decision were capped at eight percent. The effect of these provisions would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined.

Approval of Negotiated Lease Amendments

The agreement reached by the successive Navajo Nation administrations remained fixed for over two years. It was conditioned upon the approval of this same rate for another lease, Lease 5743, which was a joint enterprise of the Navajo Nation and Hopi. This lease did not provide for any rate revisions. The Hopi approved that lease's amendment in July 1986. The amendments were formally placed before the Navajo Nation Tribal Council and approved by that body in August 1987. Subsequently, Peabody and the Navajo executed the amendments, making them ripe for Secretarial review pursuant to the IMLA. Although the parties do not raise the point, we would be surprised if the Department was not fully apprised of the draft months, if not years, earlier.

On November 26, 1987, the agreement was officially forwarded to DOI for its review and approval as required by IMLA. Given the twenty-year history of Lease 8580 under the previous provisions and the long negotiating process ultimately resulting in the new lease terms, the facts indicate a relatively quick review

process of a few days over the Thanksgiving holiday. Plaintiff condemns this "rush job" and notes that a flawed economic analysis of the lease amendments was performed as part of the review process. And one of the officials in the DOI to whom the amendments were sent for review, Mr. Frank Ryan, refused to sign his approval because he felt he "would be participating in a breach of trust." Deposition of Frank Ryan, November 7, 1995; III Pl. App. at 1510.

On December 14, 1987, the Secretary formally approved the lease amendments. The recommendation accompanying the endorsement asserted as a basis for approval "that the parties ha[d] negotiated at arm's length, in good faith to reach [the] amendments." Four days after the approval, the BIA Navajo Area Director's royalty adjustment of twenty percent, dating back to June 18, 1984, was formally vacated.

DISCUSSION

The Statute of Limitations

Plaintiff filed this case on December 14, 1993, the sixth anniversary of the Secretary's approval of the lease amendments. The government does not agree that the statute of limitations begins to run with the Secretary's approval. The government argues that to the extent plaintiff's claim is based on the Secretary's actions in July, 1985, the claim is time-barred under the six-year statute of limitations. *See* 28 U.S.C. § 2501 (1999). We reject that position for two independent reasons: (1) the Navajo Nation's cause of action had not yet accrued in July, 1985; and (2) the Secretary's conduct remained secret until after the Navajo Nation's complaint was filed.

Accrual of a cause of action occurs "when all events which fix the government's liability have occurred and the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original); *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988); *see also, Sankey v. United States*, 22 Cl. Ct. 743 (1991) (statute begins to run when underlying facts of claim become known or knowable to plaintiff), *aff'd* 951 F.2d 1266, 1991 WL 260869 (1991). In our view the events that transpired in July 1985 initiated a course of conduct that was complete only with the challenged approval of December 1987. The government does not contend any claim based on the 1987 approval is barred. *See* Def. Clarification of Certain Proposed Findings of Fact at 1-2. The Navajo Nation's claim cannot be barred while events that directly affect the rights asserted have yet to take place.

Further, when the Navajo Nation filed its complaint it was unaware, through no fault of its own, of the July 1985 events. The complaint challenged the December 1987 approval. The statute of limitation does not run against a plaintiff who is unaware of a cause of action, whether because the defendant concealed the actions or because the injury was inherently unknowable at that point in time. *LaMear v. United States*, 9 Cl. Ct. 562, 569, *aff'd*, 809 F.2d 789 (Fed.Cir.1986) (citations omitted.) The parties' submissions concerning the events following the Hodel-Fritz memorandum reveal no evidence that the Navajo Nation was aware of the memorandum or the meeting that produced it. Speculation aside, the Navajo Nation states it first became aware of the Secretary's July 1985 decision in 1994, but they offer no specifics. The Sullivan memorandum

debriefing the meeting and its antecedents, was not produced until January 31, 1997. The government has not rebutted the Navajo Nation's claim that it was unaware of Secretary Hodel's actions before this.

Unaware of the earlier events, the Navajo Nation initially urged in its complaint that the December 1987 approval itself constituted a breach of trust. Having learned more from discovery—that is, after all, the purpose of discovery—the Navajo Nation now argues that the 1987 approval was tainted by the July 1985 events, among other things. The statute of limitations is intended to avoid the prosecution of stale claims which might prejudice the defendant; it does not preclude early evidence supporting timely claims. Sankey, 22 Cl. Ct. at 747 (citations omitted). Had the Navajo Nation sued for breach of trust in 1985, the government could persuasively have argued that the claim was not yet ripe for this Court's review.

Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 670 (1997). In its consideration of motions for summary judgment, the Court relies upon the pleadings, depositions, answers to interrogatories, answers to admissions, and affidavits, and especially in jury cases, resolves all reasonable inferences in the light most favorable to the non-moving party. RCFC 56(c). Where, as here, both parties have moved for summary judgment as to plaintiff's fiduciary claim for relief, it is incumbent upon the Court to evaluate each motion on its own merits. *Kanehl v. United States*, 38 Fed. Cl. 89, 98 (1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317,

322-23, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). Although the existence of a dispute on a material fact would defeat a summary judgment motion, there are, as we have said, no such disputes.

Breach of Trust Claim

The relationship between the United States government and Native American tribes is a fiduciary one, with the United States serving as trustee for the Indians. This trust was first created when the government entered into treaties with Indians concerning the use and occupation of tribal lands. The Navajo Nation, like other tribal governments, has reserved the right to live off of the bounty of their natural resources while entrusting the government to develop those resources in order to secure the prosperity of the Indians. Although the fiduciary relationship between Native Americans and the federal government is not necessarily described by the common law of trusts, we find it useful first to measure the government's actions against this familiar standard. The standards governing private fiduciaries and their beneficiaries provide effective analogies in the Indian claims context. *Nevada v. United States*, 463 U.S. 110, 127, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983); *Mitchell v. United States*, 229 Ct. Cl. 1, 14, 664 F.2d 265, 274 (1981), *aff'd*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Begay v. United States*, 16 Cl. Ct. 107, 127 n.17 (1987).

Breach of Trust in Court of Equity

The basic duties owed a beneficiary by a trustee are clear—care, loyalty, and candor. A trustee must use reasonable skill and care both to preserve the trust property and to make it productive. *See generally*, RESTATEMENT (SECOND) OF THE LAW OF TRUSTS

§§ 174-76, 181 (1959). Furthermore, a trustee is obligated to administer the trust solely in the interests of the beneficiary, over the interests of third parties and even over those of the trustee, itself. *Id.* at § 170. Finally, both of these duties implicate a third responsibility of the trustee—the obligation "to communicate to the beneficiary material facts affecting the interest of the beneficiary which [the trustee] knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." *Id.* at § 173, Comment d. Needless to say, a fiduciary may not deal in secret with a third party to his beneficiary's detriment. Collectively, these duties call for the trustee continually to show good faith and fair dealing. *See generally*, GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 541, 543-44 (2d ed. rev. vol. 1993).

Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

The government argues that the settlement package ultimately approved gave the Navajo a *quid pro quo* for any reduction in the royalty rate. This argument has

some appeal when we consider that the Navajo requested the Secretary to approve the lease amendments. After all, the Secretary also must consider the right of tribes to govern their own affairs, which includes making intelligent choices such as trade-offs in royalties for other economic benefits. At oral argument, plaintiff conceded that there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation—counsel informed the Court that the Navajo did not wish to invalidate the entire agreement.

But we do not have to look to the end result to find a breach—the road to approval of the amendments is much more disturbing. A fiduciary's breach is not negated by a favorable end result; it requires full disclosure and ratification, both absent here. *See* BOGERT, *supra*, § 543 at 247 n.18 ("in the application of the loyalty rule to fiduciaries the courts are not concerned with the question of actual damage to the beneficiaries in the case at hand, but rather in the preventative aspects of the rule and with the possibilities of loss in trust administration in general.") (citation omitted); *cf.* REST. 2D, *supra*, §§ 213 and 216. Even if the 1987 approval was a correct outcome, Secretary Hodel has accurately observed "that the *ex parte* communication taints the subsequent decision . . . even if you would have made exactly the same decision." Hodel Dep., I Pl. App. at 1149-50.

Entirely independent of whether profits were maximized, the Secretary and members of the Department engaged in *ex parte* communications with private industry at the expense of the Navajo, the beneficiary of the trust relationship. Then after very briefly reviewing the merits of the proposals, the Secretary approved lease amendments with royalty rates well

below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans.

Defendant argues that in suspending Mr. Fritz' proposed ruling, the United States simply allowed the Navajo Nation to exercise its sovereignty in negotiating terms for the Lease 8580 amendments and in gaining additional ground through the bargain regarding other leases and tax matters. The same rationale is asserted as the justification for the Secretary's approval of the amendments—the Secretary was hesitant to intrude upon "arms length negotiations."

A negotiator's weapon is knowledge. On this record, we can only conclude the Navajo entered the process unarmed with critical knowledge. Clearly, with Mr. Dodge's twenty percent royalty adjustment and Mr. Fritz' pending endorsement of that adjustment, the Navajo Nation had the upper hand for any negotiated settlement. In August 1985, when it resumed negotiations with the companies, the Navajo Nation no longer enjoyed the benefit of the threat that the twenty percent royalty rate was about to be affirmed.

Worse yet, the Navajo Nation was not aware that it no longer had this competitive edge in its bargaining, while the companies were well aware of the fact. In its late August 1985 response to the Navajo's inquiry on the matter, the Department of Interior had represented that the decision had not yet been made. The correspondence made no mention of the *ex parte* contacts or the fact that the Secretary had already determined to defer decision on the appeal in favor of negotiations. Unaware that the Secretary had already promised their opponents he would not decide the dispute, the Navajo

Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody and the utilities that purchased the Indian coal.

Incidentally, we imply no comment on the actions of Peabody or any of the other private interests involved. Plaintiff has sued them in District Court, where the appropriateness of the *ex parte* efforts to influence Messrs. Hodel and Fritz may ultimately be determined. But that would not change our view of the official government conduct in this matter. For as Justice Benjamin N. Cardozo observed prior to his appointment to the Supreme Court, "[m]any forms of conduct permissible in a workaday world for those acting at arms length, are forbidden to those bound by fiduciary ties." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). Subsequent events do not obviate our expectation that the Secretary's conduct be "kept at a level higher than that trodden by the crowd." *Id.* at 547.

The Court finds that the United States violated the most fundamental fiduciary duties of care, loyalty and candor. These violations, serious as they are, do not themselves confer jurisdiction on this Court, nor entitle plaintiff to money damages. Were this a court of equitable jurisdiction considering a private trust, plaintiffs might easily qualify for remedies typically afforded wronged beneficiaries. *See, e.g.*, BOGERT, *supra*, § 963 at 48 (suit for accounting and damages based on breach of trust normally brought in court of equity). But a greater showing is required to warrant a remedy in this Court.

Breach of Trust in the Court of Federal Claims

In order to succeed in litigation in this Court, the plaintiffs must show that IMLA imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages. If plaintiff fails to meet these requirements, we must reject its complaint for want of jurisdiction or failure to state a claim, or on summary judgment. While these are conceptually different issues, they tend to merge, especially in this case.

This Court's jurisdiction requires that the substantive right to monetary recovery be found in some source of law, independent of the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*); *United States v. Testan*, 424 U.S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). Plaintiff asserts as its independent basis the trust duties that are created by IMLA. Therefore, pursuant to 28 U.S.C. §§ 1491 and 1505, plaintiff must convince this Court that IMLA can fairly be interpreted as mandating monetary damages from the United States for the violations it claims. *Mitchell II*, 463 U.S. at 218, 103 S. Ct. 2961.

While it is not necessary that the statute explicitly state the right to damages, the government's obligation to pay must be clear and strong. *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 232 (1983). The mere existence or even the breach of a limited trust relationship between the government and an Indian tribe does not establish a claim for money damages within the meaning of the Tucker Act. *United States v. Mitchell*,

445 U.S. 535, 542, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*). It is for this reason that the serious fiduciary abuses we identified earlier are insufficient to afford relief in this Court in and of themselves. *See Montana Bank of Circle, N.A. v. United States*, 7 Cl. Ct. 601, 613-14 (1985) ("The general trust relationship in itself does not impose such duties as are erected in a complete trust with fully accountable fiduciary obligations. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.") To establish a "complete" fiduciary duty, there must be more than simply a process that was "designed to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior". *Id.* at 614. To serve as a basis for jurisdiction, the trust responsibility must mandate particular monetary relief upon the basis of statute, treaty, or assumption by the government of the task of managing economic assets.

Since no authority relied upon by plaintiff explicitly provides for monetary relief, we look toward the level of management and control that the government has assumed over coal leases under IMLA. Whether the trust responsibility the Secretary is alleged to have violated is "money mandating" can only be determined by evaluating the underlying statutory scheme. *See, e.g., Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961. Accordingly, we review IMLA and the regulations promulgated pursuant thereto, and then compare them to cases applying the *Mitchell* tests.

The Indian Mineral Leasing Act of 1938

The Indian Mineral Leasing Act of 1938, provides:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, *with the approval of the Secretary of the Interior*, be leased for mining purposes, *by authority of the tribal council or authorized spokesman for such Indians*, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

25 U.S.C. § 396a (emphasis added). The remainder of the Act is very general, providing for the acceptance of surety bonds by the mineral lessee (25 U.S.C. § 396c), the promulgation of rules and regulations governing mining operations (25 U.S.C. § 396d), and the delegation by the Secretary of lease *approval authority* (25 U.S.C. § 396e). We note, however, that the legislation also contains separate provisions, more exacting requirements if you will, for the leasing of oil and gas. *See* 25 U.S.C. §§ 396b, 396d, 396g; *see also Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (in reviewing Secretary's duties respecting oil and gas leasing, Court observed that IMLA "imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of the Indians."); accord, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1564-65 (10th Cir. 1984).

We recognize that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 105 S. Ct.

2399, 85 L. Ed. 2d 753 (1985) (leasing procedures detailed by Congress intended to protect the Indians). In fact, the measure was passed in part because existing law was considered inadequate to give the Indians the greatest return from their property. S. REP. NO. 75-985 (1937). Other purposes in enacting the legislation were to achieve uniformity in tribal leasing and to increase Indian authority in granting leases. *Id.* In general, then, IMLA imposes upon the federal government a fiduciary obligation to develop a mineral leasing program which would provide the highest possible financial return to the Indians. *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 238 (1985); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 33 Fed. Cl. 464, 468 (1995)(recognizing 10th Circuit's finding of breach of trust).

These responsibilities fall upon the Secretary of Interior and the officials in the specialized subordinate agencies within the Interior Department. Those agencies have, in turn, promulgated regulations governing mineral leasing on tribal lands.

The provisions for leasing of tribal lands for mining that were in effect at the time plaintiff's cause of action accrued are set out in 25 C.F.R. Part 211 (1985). The procedures described within Part 211 cover all mineral leasing, not just coal. Like the statute itself, the regulations give extra attention to oil and gas leases. We mention this because plaintiff has proposed that management of coal leasing is indistinguishable from oil and gas leasing under *Pawnee v. U.S.*, 830 F.2d 187 (Fed. Cir. 1987), *cert. den'd*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), a case which we discuss momentarily.

Although the Navajo Nation has not specifically addressed many of these regulatory provisions, we have reviewed them at length. There are provisions on the manner of payments, inspections, penalties, fees, and cancellation. There are also a host of provisions governing mining operations, primarily for petroleum products. Finally, the item of interest here is addressed—royalties. With respect to royalties, sections 211.13, 211.16, and 211.17 contain very extensive and explicit procedures governing royalties *for oil and gas leases*, including criteria by which the Secretary is to set royalty rates for oil and gas leases. By comparison, the only provision governing royalties of coal, in particular, tersely states:

> [f]or coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack."

25 C.F.R. § 211.15(c). In glossing over these regulatory provisions, the Navajo Nation has necessarily failed to demonstrate how the Secretary violated his duty under the regulations, if such a duty is created by those provisions.

Plaintiff's briefs do make several references to regulations demonstrating a preference for competitive bidding over the negotiation of leases by tribal authorities. *See* 25 C.F.R. § 211.2. As plaintiff explains, the provision is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources. Pl. Br. at 41, 44; Pl. Resp. at 46. Although the Navajo Nation cites case law demonstrating the point, it cites no decision of this Court, nor does it provide any authority

for the proposition that violation of the regulation calls for money damages. In any case, the competitive bidding provision is inapposite. Such a provision by definition applies to the negotiation of a new leases among a number of potential lessees, not the renegotiation between lessor and lessee of a term in a pre-existing lease.

In addition to those procedures defined within the Code of Federal Regulations, the Navajo Nation has cited internal policies and procedures in the DOI Manual and Bureau of Indian Affairs Manual. Pl. Br. at 6. These manuals acknowledge the general duty to maximize income from Indian mineral leasing. Consistent with this goal, the manuals prescribe economic appraisals of the transactions between Indians and private companies such as Peabody.

We have on prior occasions recognized that the statutory and regulatory framework governing mineral leasing under IMLA requires the Secretary to use reasonable skill and care in maximizing economic benefits for the Indian lessors. *Cheyenne-Arapaho*, 33 Fed. Cl. at 468; *Navajo Tribe*, 9 Cl. Ct. at 238. However, IMLA has a second purpose—to foster Indian self-determination. The legislative history indicates that prior to enactment of the IMLA Indians were on occasion compelled to lease land over their opposition. S. REP. NO. 75-985, at 2. Accordingly, IMLA clearly stops short of turning over control to the Secretary, providing that "lands within any Indian reservation . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, *by authority of the tribal council or other authorized spokesman* . . ." 25 U.S.C. § 396(a) (emphasis added). The ideal of Indian self-

determination is directly at odds with Secretarial *control* over leasing.

The lease itself reflects the measure of control assumed by the Navajo, and the correspondingly subordinate role of the Secretary: (1) the Secretary may suspend the lease for economic reasons, but only with the concurrence of the Navajo—Art VIII; (2) the lessee may not assign the lease without Secretarial and Navajo consent—Art XI; (3) the lessee's account books are open to Secretarial and Navajo inspection—Art XIII; and (4) the Navajo and the Secretary reserve the right to cancel the lease for violations of its terms by the lessee. And, of course, the Secretarial power to adjust rates after twenty years is conferred by the lease—Art. VI. *See Lease* 8580 (Feb. 1, 1964).

Navajo Coal Mining in Context

There is a wealth of case law presenting varying degrees of federal management of or control over the administration of Indian leases. The landscape includes the Supreme Court's decisions in *Mitchell I* and *Mitchell II* at the polar extremes. Finding their place along the resulting continuum, the cases of *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), *Wright v. United States*, 32 Fed. Cl. 54 (1994), and *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), provide useful correlations. *Wright* and *Brown* both involve leasing activity by Indians on allotted lands. In *Wright*, the limited Secretarial "approval only" role was insufficient to invoke the jurisdiction of the Court. Conversely, the statutory scheme in *Brown* permitted the Secretary to cancel a lease without the consent of the Indian lessors, and was considered sufficient for jurisdiction.

In *Mitchell I*, the Supreme Court evaluated this Court's jurisdiction over claims arising from the government's alleged mismanagement of timber resources on land allotted to Indians under the Indian General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, and found it wanting. Specifically, the Court examined whether a trust duty to manage these resources was comprehended by the General Allotment Act. In holding that the Act created only a limited trust relationship between the government and Indian allottee, the Supreme Court reversed the Court of Claims' *en banc* recognition of a fiduciary duty which conferred jurisdiction. *Mitchell I*, 445 U.S. at 542, 100 S. Ct. 1349. Although land allotted to Indians was to be held in trust by the government, that particular legislation left it to the Indian allottee to use the land for agricultural and grazing purposes. Therefore, reasoned the Supreme Court, "the Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* (emphasis added).

Upon remand, however, the Court of Claims found that a host of other statutes and regulations governing everything from timber sales to conservation responsibilities created the specific fiduciary duty found lacking under the general allotment scheme. *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265 (1981). The Supreme Court ultimately agreed, holding that the "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber" gave rise to an expectation of benefit sufficient to confer jurisdiction on this Court for breach of those responsibilities. *Mitchell II*, 463 U.S. at 222-24, 103 S. Ct. 2961 (citation omitted).

The statutes and regulations cited in *Mitchell II* illustrate pervasive governmental control and daily supervision over the management and sale of forest products on allotted land—comprehensive regulations "addressed virtually ever aspect of forest management" and conditioned approval of timber sales on compliance with their requirements. *Mitchell II*, 463 U.S. at 219-22, 103 S. Ct. 2961. Therefore, this Court clearly has jurisdiction over breach of trust claims where the corpus of the trust is a resource over which "[v]irtually every stage of the process is under federal control." *Id.* at 222, 103 S. Ct. 2961 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)).

In the aftermath of *Mitchell I* and *Mitchell II*, claims based upon fiduciary duties respecting the management of those resources are denied where the government's supervision and control over tribal resources is limited. Implicated in every instance is the delicate balance struck between exercising fiduciary responsibilities and respecting tribal sovereignty and self- determination.

The *Brown* case involved commercial leasing activity on allotted land. The Court of Appeals for the Federal Circuit evaluated the fiduciary relationship formed under the Indian Long-Term Leasing Act (*see also*, *Pawnee*, 830 F.2d 187 (Fed. Cir. 1987)) and the Indian General Allotment Act (see also, *Mitchell I*, 445 U.S. 535, 100 S. Ct. 1349, 63 L.Ed.2d 607 (1979)). Acknowledging that the statutes and regulations did not confer upon the Secretary comprehensive management leasing under that scheme. It thus focused on the second prong in *Mitchell II*. The "management" test looks to the existence of a "comprehensive" scheme for there to be a trust relationship sufficient for our Court to have

jurisdiction. By contrast, the "control" test has no such qualifiers. *See Brown*, 86 F.3d at 1560-61. The Federal Circuit held in *Brown* that the commercial leasing program gave the Secretary effective control over leasing of allotted lands which must be exercised for the benefit of the Indians. *Id.* at 1556, 1561. Under those circumstances, the Court found that the government had assumed an enforceable fiduciary duty sufficient for Court of Federal Claims jurisdiction. *Id.* at 1563.

In particular, the Court distinguished between mere "oversight power" to review transactions already negotiated and executed by others, and the broader authority over commercial leasing under the Indian Long-Term Leasing Act. *Id.* at 1566. Allottees, for example, were entitled to lease allotted lands only for certain statutorily prescribed purposes and only after seeking the permission of the Secretary of the Interior and complying with terms and forms dictated by the Secretary. *Id.* at 1561-62. Furthermore, under the commercial leasing scheme, the allottee could not cancel a lease without prior approval of the Secretary. By contrast, the Secretary was entitled to cancel a lease even over the protest of the Indian allottee-lessor. *Id.*

The regulations at issue here also require use of certain forms, an unremarkable requirement in our view. 25 C.F.R. § 211.30. Likewise, the regulations provide for Secretarial cancellation, but only for cause, an important distinction from the regulations in Brown. 25 C.F.R. §§ 211.27, 211.22. On the whole, IMLA and the 25 C.F.R. Part 211 regulations, especially as they relate to the leasing of coal, preserve the Indians' ability to enter into and cancel leases. As we noted earlier, IMLA sought to remedy situations in which "the Indians at no time ha[d] any voice in the granting

of such leases." S. REP. NO. 75-985 at 2; *see also, Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981) (one aim of the 1938 Act was to give "tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary.")

The regulatory scheme for coal stands in stark contrast to that for oil and gas. A number of cases have found the oil and gas program amounts to a jurisdictional trust. *Cheyenne-Arapaho Tribes v. U.S.*, 33 Fed. Cl. 464 (1995); *Pawnee*, 830 F.2d 187 (Fed. Cir. 1987); and *Assiniboine and Sioux Tribes*, 792 F.2d 782 (9th Cir. 1986). That, however, has not happened as respects coal. *Compare, Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227 (1985) (Lydon, J.) (Court assumed the existence of a jurisdictional trust for minerals in general, but without extensive analysis). Unlike the commercial leasing in *Brown*, mineral leasing under IMLA requires the consent of the Indian lessor before the Secretary may take actions affecting the lease. *See, e.g.*, 25 CFR § 211.14a (Secretary may authorize suspension of mining operations only after obtaining the consent of the tribe).

In *Wright*, this Court found jurisdiction lacking. There, we revisited the allotment regulatory scheme, this time in relation to the leasing and permitting of Indian allotted lands. In an attempt to escape the result reached in *Mitchell I*, the plaintiff in *Wright* focused upon the Secretary of Interior's power to authorize leases, arguing that this role extends the Secretary's relationship beyond a bare or generalized trust. However, the Court found that "the Govern-

ment's role in leasing is limited to final review of leases negotiated by others." *Wright*, 32 Fed. Cl. at 58. Such a role, standing alone, is insufficient to create the type of fiduciary duty that can be enforced through a money remedy in this Court. *Id.* at 59. We concur.

Finally, there is the *Pawnee* case, in which federal responsibilities for management of oil and gas leases were at issue. Reversing this Court's holding to the contrary, the Federal Circuit found that the statutes and regulations established fiduciary duties that mandated compensation for breach. *Pawnee*, 830 F.2d at 190. Not only was there "comprehensive management," but there were also specific financial responsibilities, very much akin to those of private trustees. Like the Navajo Nation, the Pawnee tribe complained that the Secretary violated his fiduciary duty when he received royalties below market value. Even in the context of what we might describe as a "financial trust," the Court concluded that the Secretary's discretion in rate-setting did not obligate him to set the highest rate.

As we have noted, the statutory and regulatory context from which the *Pawnee* claims evolved is quite different from the coal regulatory scheme, and especially the general provision for royalty adjustment under IMLA. One of the statutes relied upon by the Pawnee is entirely dedicated to management of oil and gas royalties. The two statutes—the Indian Long-Term Leasing Act, 25 U.S.C. § 396 (1988) and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 (1988)—and a large body of regulations gave the Secretary broad authority in leasing property and in collecting royalties on behalf of the Indians. In sum, those authorities clearly demonstrated that "the United States has exercised its super-

visory authority over oil and gas leases in considerable detail." *Pawnee*, 830 F.2d at 190 (quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968)).

As under the IMLA scheme, the discretion vested in the Secretary by the statutory authority cited in Pawnee was to be exercised to serve the interests of the Indian trustees. However, the level of management and control exercised by the Secretary in the oil and gas leasing context more closely resembles that of the forest management scheme in *Mitchell II*, than the regulation of coal leasing at issue here. For instance, in describing the Indian Long-Term Leasing Act—one of two authorities invoked in Pawnee—the Court wrote:

> This statute places the Secretary of the Interior at the center of the leasing of Indian mineral lands. He determines whether to consent to a lease and the terms of the lease; he performs 'any and all acts' necessary to carry out the statute 'into full force and effect . . .'.

Id. at 189.

Furthermore, in *Pawnee* the Court cited a litany of regulatory provisions dealing specifically with aspects of the management of royalties, the very item of which those plaintiffs complained. In our case, the regulations and statutory provisions cited by the Navajo cover a range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties. *See* Pl. Br. at 34 (*citing*, 25 C.F.R. Part 211 (1985); 25 C.F.R. Part 169 (1985); 25 C.F.R. Part 200 (1993); and 25 C.F.R. Part 216 (1985)).

The Secretary's Duties Defined

Defendant concedes that the Secretary owes some measure of trust responsibility, but argues that the responsibility as it relates to coal royalties does not rise above a generalized trust obligation. We agree. Under *Mitchell II*, the contours of the trust responsibility are defined by statute and regulation. *See Brown*, 86 F.3d at 1563 (citing *Pawnee*, 830 F.2d at 192, and *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961). In order for a trust relationship to support an action for money damages, those "statutes and regulations must 'unambiguously provide that the United States has undertaken full fiduciary responsibilities' *as to the particular aspect of the relationship complained of.*" *Wright*, 32 Fed.Cl. at 56 (quoting *Mitchell I*, 445 U.S. at 542, 100 S. Ct. 1349) (emphasis added).

Although the Federal Circuit in Pawnee found jurisdiction was proper, the Court upheld our rejection of the tribe's claim, ruling that the plaintiffs had failed to allege a specific violation of any of the duties imposed by statute or regulation. In doing so the Federal Circuit specifically refused to recognize a fiduciary obligation beyond that which springs directly from the pertinent statutes and regulations. *Pawnee*, 830 F.2d at 191-92.

The Navajo Nation's complaint suffers from the same shortcoming. Alleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision. For instance, the Navajo Nation has aptly demonstrated that the Secretary did not act as a proper trustee. But the Navajo fail to demonstrate a "breach of a specific duty that the regulations squarely place on the Secretary." *Brown*, 86 F.3d at 1563.

While the statute provides in general terms for the Secretary to maximize revenues and foster Indian self-determination, neither IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal. In *Pawnee*, the trust responsibility was specifically tied to obligations—both statutory, 30 U.S.C. §§ 1701-57, and regulatory, 25 C.F.R. §§ 212.4, 212.12, 212.14, 212.16—respecting oil and gas royalty management, yet the complaint still failed. 830 F.2d at 189-90.

The Navajo Nation cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process. It is also quite apparent that IMLA does not involve the Secretary, even moderately, in every stage of the coal leasing process. In our case, the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease*:

> the royalty provisions of this Lease are subject to *reasonable adjustment* by the Secretary of the Interior or his authorized representative at the end of 20 years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

Article VI, Lease 8580 (emphasis added).

Other coal owned jointly by the Navajo and Hopi tribes was mined under leases (Navajo Lease 9910 and Hopi Lease 5743) with no royalty adjustment clause, and thus provided no occasion for Secretarial action on those royalty rates. By its very terms, the Navajo Nation lease did not call for a royalty rate adjustment until twenty years after its execution, and subsequent adjustments only every ten years. Even then, the

Secretary's only guidance was to be "reasonable" in revising rates.

The plaintiff notes that as a matter of policy, DOI would not approve coal leases with royalties less than those the trustee would receive for its own coal—at that time and now, apparently, 12.5 percent. But even under that policy, the Secretary's obligations are limited to the approval of royalty provisions at specific junctures during a lease's life, which now is limited to ten years. Nowhere does that policy, nor any other policy, impose an affirmative duty to interject government-dictated royalty rates. I Pl. App. 183-84. And, of course, there is no claim by the Navajo Nation that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy.

It is perhaps unnecessary to note that we do not view *Mitchell II* as the threshold level of Secretarial management required to invoke our jurisdiction over these claims. *See Brown*, 86 F.3d at 1559 n. 6 (trial court appeared to have misapplied *Mitchell II* transforming "the descriptive into the prescriptive."). We find that the Secretary's role in the Navajo's coal leasing—that is, his control or supervision of coal leasing—falls far short of the detailed fiduciary responsibilities of *Mitchell II*, *Pawnee*, and *Brown*, on the one hand, and is more akin to the general fiduciary responsibilities addressed in *Mitchell I* and *Wright*, on the other. And even if we were to find otherwise, the Navajo Nation has not alleged a breach of a specific trustee duty.

Breach of Contract Claim

In its second claim for relief, plaintiff alleges that Lease 8580 constitutes a valid contract or contract-implied-in-fact between the United States and the

Navajo Nation respecting the adjustment of the royalty. The Navajo further allege that this contract was breached when the government approved lease amendments which failed to adjust the royalties to a reasonable level, twenty percent being that level. In evaluating this claim for relief we look not to trust duties, or duties imposed by treaty, statute, regulation, or policy. Rather we search the record for evidence of an independent contractual obligation assumed by the Secretary in Lease 8580. We find none.

We note at the outset that although the issue is ripe for decision, plaintiff has not moved for summary judgment on its second claim for relief; the government, however, has done so in its cross-motion. Initially, the breach of contract claim was not briefed sufficiently. At the oral argument on the breach of trust claim, the Court requested briefs on the merits of the breach of contract claim and later heard oral argument.

The government offers five reasons for judgment as a matter of law: (1) The Secretary is not a party to the lease; (2) the lease's authorization to adjust the royalty rate does not amount to a binding contractual obligation; (3) the Secretary fulfilled any contractual obligation when Mr. Dodge first adjusted the royalty to twenty percent; (4) the decision adjusting the royalty was vacated at the Navajo Nation's request when it sought approval of the negotiated rate; and (5) the contract claim is barred by the statute of limitations. We have already rejected the statute of limitations argument in relation to the first claim for relief, and we do so again for the reasons previously stated.

Except for the first two arguments, the government's grounds for summary judgment in large part go to the issue of breach. We do not reach that issue

because we find as a matter of law that the government owed no contractual obligation toward the Navajo Nation. In order for a contract, whether express or implied, to be binding upon a party we must find mutual intent to contract demonstrated by an unambiguous offer, acceptance, and consideration. *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). These elements are not present. We find no intent on the part of the Secretary to assume a contractual obligation, and we find no consideration—both essential to the formation of a written or an implied contract.

Contract Formation and Lease 8580

Lease 8580 was executed by the Chairman of the Navajo Tribal Council and the Vice President of Sentry Royalty Company, Peabody's predecessor in interest. The terms of the lease clearly designate the tribe as lessor and Sentry as lessee. Plaintiff relies on explicit provisions within the lease, primarily Article VI, to hold the government contractually bound. Article VI is entitled "Termination of Federal Jurisdiction." The pertinent clause simply made the royalty provisions of Lease 8580 "subject reasonable adjustment" by the Secretary at various infrequent junctures (at the twenty-year mark and every ten years thereafter) during the life of the lease. It does not by its terms suggest a contractual obligation.

The remaining lease provisions present an even less compelling case for the assumption of contractual liability. In fact, one can highlight every reference to the Secretary and arrive at the same conclusion—the language of the contract does no more than confirm the Secretary's role under IMLA. *See* Lease 8580, Art. VIII (when permitted by law and with the concurrence

of the Navajo, Secretary may suspend mining operations in the event of unsatisfactory economic conditions or inadequate marketing facilities); Article XI (prohibiting assignment of the leasehold interest by the lessee without the prior approval of the Secretary and the Navajo); Articles XVI and XXIV (authorizing the Secretary to nullify lease in the event lessee fails to comply with its covenants or uses the property for unlawful conduct); and Article XIII (providing that leasehold property and lessee's accounts "shall be open at all times for inspection by agents of Lessor or any duly authorized representative of the Secretary of Interior.") While Article VI and the remaining provisions cited by the Navajo Nation call for Secretarial involvement in various aspects of the administration of the lease, nothing in those provisions makes the United States a party to that contract.

In 1964, the Assistant Area Director of the Bureau of Indian Affairs approved the lease that had been executed by Navajo and Sentry. This approval, like the approval 23 years later of the lease amendments, was no more than the fulfilment of the Secretary's statutory duties, and evidenced no intent to contract. Defendant makes this very point, relying upon language in both *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968), and *United Nuclear Corp. v. Clark*, 584 F. Supp. 107, 108 (D.D.C. 1984), restricting the Secretary's ability unilaterally to enter into a mineral lease or extend its terms. The rationale for the restrictions was the same in both instances—the Secretary was not the lessor, notwithstanding the fact that Secretarial approval was required. *Poafpybitty*, 390 U.S. at 372, 88 S. Ct. 982.

When the Secretary reviews and approves mineral leases as part of his statutory responsibilities, he does not become a lessor or a lessee. We believe this to be the general rule, absent specific statutory authority to the contrary. *See Poafpybitty and United Nuclear Corp., supra*; *see also, Sangre de Christo Devel. Corp. v. United States*, 932 F.2d 891, 895 (10th Cir. 1991) (statute providing for approval of Indian lease "is no different than many other federal statutes that require federal approval of private agreements"), *cert. denied*, 503 U.S. 1004, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992). We are unaware of any authority to the contrary, and plaintiff has not pointed us to any.

Consideration

Even were there an intent to assume a contractual obligation, there still must be consideration—a bargained for exchange—in order to create a contractual obligation. *See generally*, RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 71-81 (1981). The lease clearly sets out the "consideration" supporting the agreement at the beginning of the instrument. Lease 8580, Article I ("Consideration"). The paragraph identifies an exchange of benefits between the lessor and lessee, but makes no mention of the United States. By its terms, the lease suggests no benefit flowing to the United States.

In an effort to demonstrate consideration enuring to the government's benefit, plaintiff sets forth facts which are not in dispute, but which we do not find compelling: First, that public utilities rely solely on the lessee's coal-mining operations; and second, that the United States Bureau of Reclamation owns a 24.5 percent beneficial interest in one of the utilities relying on the Navajo coal. Plaintiff would have us take notice

that increases in the royalties paid the Navajo will be borne by the utilities and consumers. *See* Plaintiff's Summary of Facts Relating to Contract Claim. This is not particularly relevant to the issue of consideration, but the inference tends to demonstrate a potential conflict of interests on the part of the government.

A reasonable inference can be drawn that the Secretary of the Interior derived some intangible benefit in the continued execution of the Lease 8580. We grant that "[t]he 8580 Lease was and is one important part of a larger initiative to provide electricity and water to the American Southwest by the United States Bureau of Reclamation and the owners of the Mojave and [Navajo Generating Station] plants . . .". Consolidated Statement of Proposed Uncontroverted Facts. One could conclude that the Secretary's role in enforcing the covenants of the lease and in ensuring a reasonable royalty rate confers the public benefit of sustaining the energy needs of the region. And to the extent the lease provided economic benefits to the Navajo, the Secretary's obligations to that Indian community were also furthered. This does not carry the argument, however. These objectives fall well within the ambit of the Secretary's executive responsibilities. They do not demonstrate independent consideration supporting the government's "promise" to adjust rates.

Contract Implied-in-Fact

In its First Amended Complaint the Navajo Nation pled alternatively that the lease gave rise to a contract implied-in-fact. Such a contract may spring from the Navajo Nation's recourse to the rate-setting mechanism and the government's assumption of the responsibility to set a revised rate. Under this implied

contract theory, once the Secretary assumed the responsibility to adjust the royalty provisions of Lease 8580, he was required to act in good faith and with fairness to all parties. According to plaintiff this covenant of good faith and fair dealing "require[d] that any discretion granted the Government under Article VI be exercised reasonably." Pl. Opp. (Count II) at 9.

But we must first find the existence of an implied-in-fact contract binding the government. Plaintiff insists that such a contract may be found in the words and actions of the Navajo Nation and the United States. We disagree. For the government to be considered a party to a contract implied-in-fact we must find mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance—the same elements required for a written or express contract—and conduct by a government representative with actual authority to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. den'd* 501 U.S. 1230, 111 S. Ct. 2851, 115 L. Ed. 2d 1019 (1991) (citations omitted); *see also Vines v. United States*, 30 Fed. Cl. 711, 714 (1994) ("the facts and circumstances of the case must show that 'the parties have taken upon themselves corresponding obligations and liabilities and have come to a meeting of [the] minds.'") (quoting *Commonwealth of Kentucky v. United States*, 27 Fed.Cl. 173, 176 (1992)). On the evidence before us, each of these elements fails for the very same reasons we have enunciated regarding plaintiff's express contract theory. If, as we have found, Lease 8580 does not create a contractual obligation on the part of the Secretary, we are at a loss as to how the Secretary's assumption of the rate-revision function and then his abandonment of that function, plus his later approval of

the amendments, create a contractual obligation. The Navajo Nation has not demonstrated how the implementation of a non-contractual function creates a contractual obligation.

In conclusion, we find plaintiff's claim of breach of contract lacking in at least three respects: The Secretary's approval of the 1964 lease with the Article VI provision for subsequent adjustment was based on his statutory responsibilities and evidenced no intent to assume a contractual obligation; there was no consideration to support an agreement by the government; and the assumption of the rate-setting function of Article VI created no contractual obligation.

CONCLUSION

The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty—a classic violation of common law fiduciary obligations. Nonetheless, the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs. Defendant has thus established its right to judgment as a matter of law. Further, the Court finds that the government did not enter into a contract with Navajo Nation either by the express terms of Lease 8580 or by implication.

Accordingly, defendant's motions for summary judgement with respect to plaintiff's breach of trust claim and its breach of contract claim are GRANTED. The Clerk of Court is directed to enter judgment for defendant and dismiss plaintiff's First Amended Complaint.

APPENDIX

TO: John W. Fritz

FROM: Don Hodel

RE: Appeal of Navajo Area Director's Adjustment Of Royalty, Lease No. 14-20-0603-8580

I have reviewed the attached letter from Mr. C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late 1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5

percent which is currently required on surface coal mining leases on federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal, therefore, a decision on the appeal at this time would be ill-timed. I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

MEMORANDUM FOR: JOHN FRITZ

FROM: DONALD PAUL HODEL

SUBJECT: APPEAL OF NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY LEASE NO. 14-20-0603-8580

I have reviewed the enclosed letter from C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the

subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late-1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on Federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma. I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal; therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of

the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 00-5086

THE NAVAJO NATION, PLAINTIFF-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Dec. 12, 2001]

JUDGMENT

ON APPEAL from the United States Court of FederalClaims

In CASE NO(S). 93-CV-763

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: REVERSED AND REMAND

ENTERED BY ORDER OF THE COURT

DATE: AUG 10, 2001 JAN HORBALY
JAN HORBALY, Clerk

ISSUED AS A MANDATE: NOVEMBER 23, 2001

Costs Against Appellee:
Printing $4,162.88
Total $4,162.88

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION

v.

THE UNITED STATES

[Filed: Feb. 1, 2000]

JUDGMENT

Pursuant to the court's Published Opinion, filed February 4, 2002,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of the defendant and the First Amended Complaint is dismissed.

Margaret M. Earnest
Clerk of Court

February 4, 2000 By: LISA L. MOFADE
LISA L. MOFADE
Deputy Clerk\

NOTE: As to appeal, 60 days form this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

APPENDIX E

MINING LEASE
CONTRACT NO. 14-20-0603-8580
Between
SENTRY ROYALTY COMPANY AND THE NAVAJO TRIBE

THIS INDENTURE OF LEASE made and entered into in sextuplicate effective the 1st day of February, 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor," and the SENTRY ROYALTY COMPANY, a Nevada corporation with offices at 301 North Memorial Drive, St. Louis, Missouri 63102, herein designated as "Lessee."

WITNESSETH:

* * * * *

ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION

During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In the event Federal jurisdiction shall have been terminated and the royalty provisions are subject to negotiation as provided in this section, within ten days after the request of either Lessor or Lessee for submission to arbitration, Lessee shall name one arbitrator and Lessor shall name one arbitrator, and the two named shall select within ten days next ensuing a third arbitrator. In the event the two arbitrators named by the parties cannot agree upon a third arbitrator, then any Judge of a United States District Court for the District of Arizona may select the third arbitrator. In determining the royalty provisions, the arbitrators shall consider all pertinent evidence to establish the value of coal and shall fix a royalty fair to both Lessor and Lessee under the circumstances existing at the time of such arbitration.

* * * * *

AMENDMENTS TO COAL MINING LEASE

NO. 14-20-0603-8680

BETWEEN THE NAVAJO TRIBE AND PEABODY COAL COMPANY

[Received Dec. 30. 1987]

* * * * *

4. Adjusted Royalty Payment. Article VI, entitled Termination of Federal Jurisdiction, p. 7-8, is deleted from the Lease and the following is substituted:

VI. Adjusted Royalty Payment

Lessor and Lessee recognize that a dispute has arisen between them with regard to the validity and reasonableness of the royalty adjustment decision of the Bureau of Indian Affairs Navajo Area Director dated June 18, 1984, which decision was purported to be made pursuant to Article VI of the original terms of this Lease No. 14-20-0603-8580. Such decision is currently on appeal by Lessee before the Assistant Secretary of the Interior for Indian Affairs.

(a) In consideration of the benefits associated with these lease amendments, as well as those associated with amendments to Lease No. 14-20-0603-9910, Lessor and Lessee hereby jointly move that the royalty adjustment decision of the BIA Navajo Area Director dated June 18, 1984, pertaining to this Lease be vacated and declared to be of no force or effect and, by approving these lease amendments, the Secretary of the Interior does hereby vacate that royalty adjustment decision

and render that royalty adjustment decision to be without legal force or effect.

(b) Upon the approval of these amendments by the Secretary of the Interior, the provisions of Article IV and VI of these lease amendments shall be the sole and exclusive method for the determination or readjustment of royalty rates under Lease No. 14-20-0603-8580 for periods beginning on and after February 1, 1984.

(c) For all coal obtained from the premises leased under this Lease during the period February 1, 1984, until the effective date of these amendments, Lessee shall pay Lessor twelve and one-half percent (12.5%) of the gross realization received by Lessee for such coal, with gross realization computed in accordance with the method utilized at the time the coal was sold for computing royalties on federal coal leases. The payment under this subparagraph (c) shall be due and payable within ten (10) calendar days of the effective date of these amendments. For purposes of Article XXXV herein such payments shall be allocated so that payment shall be deemed to be made in the year in which the coal was sold.

(d) For the payments described in subparagraph (c) above and other good and valuable consideration contained in this Lease as herein amended, Lessor agrees not to assert any claim or other demand for any amounts as past due royalty under this Lease for the period February 1, 1984, to the effective date of these lease amendments or interest thereon, except that nothing in this provision shall relieve Lessee from the obligation to pay any additional amounts determined tobe due to Lessor under subparagraph (c) above after audit or review of Lessee's production and/or royalty data.

APPENDIX F

1. 28 U.S.C. Section 1491(a)(1) states in part:

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. 28 U.S.C. Section 1505 states:

§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Execution orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.